( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No.

CENTRAL NEW ENGLAND RAILWAY COMPANY, PETITIONER,

vs.

BOSTON & ALBANY RAILROAD COMPANY, ASSIGNOR FOR THE BENEFIT OF NEW YORK CENTRAL RAILROAD COMPANY, ASSIGNEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT FOR THE COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS

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[fol. 1]

IN SUPERIOR COURT OF SUFFOLK COUNTY

NEW YORK CENTRAL RAILROAD COMPANY

v.

CENTRAL NEW ENGLAND RAILWAY COMPANY

Defendant's Substitute Bill of Exceptions—Filed Jan. 28, 1928

This is an action of contract tried before Callahan, J., and a jury in the Fifth Session of the Superior Court for Suffolk County and on February 23, 1927, the jury returned a verdict for the plaintiff in the amount of $169,012.72.

The Declaration, Demurrer, Waiver, Substitute Answer, Plaintiff's Motion for Specifications, the Defendant's Specifications, and Amended Motion to Dismiss are made a part of this Bill of Exceptions.

The defendant's amended motion to dismiss, to which was attached the report of the Interstate Commerce Commission and its certificate in Finance Docket No. 1479, was denied and the defendant's exception thereto duly noted. For the purpose of this motion the report of the Interstate Commerce Commission and its certificate in Finance Docket No. 1479, hereto annexed as "Exhibit A," was before the Court.

All exhibits introduced in evidence at the trial, some of which are hereto annexed, may be used at the hearing upon the Bill of Exceptions.

Offers in Evidence

The plaintiff introduced in evidence the lease of the Boston & Albany Railroad Company to the New York Central Railroad Company, dated November 15, 1899, the supplementary agreement with respect to said lease, also dated November 15, 1899, and agreement of acceptance of the [fol. 2] Massachusetts Act of July 17, 1900, dated September 19, 1900, all of which were contained in one instrument and were marked "Exhibit 1." This lease covered a period of ninety-nine (99) years from and after the first day of July 1900, and granted to the lessee the right of the lessor in

"its railroads and property of every description, whether within its location or not, including therein its railroad, lands and wharves, branches, tracks, side-tracks, road-beds, superstructures, station houses, depot grounds, depots, viaducts, bridges, piers, shops, buildings and fixtures; and also its engines, rolling stock, machinery, tools, furniture, appliances, telegraph apparatus and equipment; and all rights, franchises, easements, privileges, and appurtenances thereunto belonging, together with the right to demand and receive all tolls, rent, revenue, income and profits of the demised premises, including also therein all the right, title and interest of the said lessor in and to any and all railroads operated by it under lease or otherwise, and in and to any stock of other corporations owned by it or held by it, and all dividends therefrom, and the right of voting on the same (the counterparts of such leases and certificates of such stocks to be assigned and transferred simultaneously with the delivery of this indenture, or as soon as practicable thereafter), and in and to all contracts and obligations of or with other railroads, corporations or individuals, and all income, advantages and benefits to be derived therefrom, and hereby assigning and transferring unto the lessee, under the terms and provisions of this lease, and for the purposes thereof, and subject to all obligations and encumbrances thereon, all its property, franchises and estates of every description, however described, and wheresoever situated, and by whomsoever held, including money, material and supplies on hand, excepting only the corporate seal, the

stockholders' and directors' record books, and the transfer and stock books, to which the lessee may have access at reasonable times, and excepting all the property, real and personal, stated and included in a schedule hereto annexed, marked 'Schedule A,' the same being property not needed for the railroad purposes of the lessee, which said property so excepted or the proceeds thereof is hereby reserved for the use and benefit of the lessor and its stockholders as the directors thereof may from time to time determine."

The plaintiff then offered in evidence the agreement for the consolidation of the New York Central & Hudson River Railroad Company, the Lake Shore & Michigan Southern Railway Company, Geneva, Corning & Southern Railroad Company, the Terminal Railway of Buffalo, The Dunkirk, Allegheny Valley & Pittsburgh Railroad Company, Chicago, Indiana & Southern Railroad Company, Detroit & Chi-[fol. 3] cago Railroad Company, Detroit, Monroe & Toledo Railroad Company, Kalamazoo & White Pigeon Railroad Company, The Northern Central Michigan Railroad Company, and the Swan Creek Railway Company of Toledo, into The New York Central Railroad Company, which was marked "Exhibit 2". Article VIII of this exhibit includes the following language:

"Article VIII. The manner of converting the capital stock of each of said consolidating corporations into that of said consolidated corporation—shall be as in this Article stated:

a. The holders of the stock of the New York Central & Hudson River Railroad Co. shall be entitled to 2,255,810.66 shares of the stock of the Consolidated Corporation. Each stockholder of the New York Central & Hudson River Railroad Company shall be entitled to one share of the stock of the consolidated corporation for each share of the stock of the New York Central & Hudson River Railroad Co. owned by him at the time said consolidation shall become effective * * *"

Article XII of Exhibit 2, which is as follows, was then read to the jury:

"Article XII. The consolidating corporations, parties hereto, hereby severally sell, assign, transfer and convey to The New York Central Railroad Company, the consolidated corporation formed pursuant to this agreement, their respective railroads together with all the rights, powers, privileges, franchises and other property used in connection therewith or pertaining thereto.

"Upon the consummation of this consolidation, as provided by law, all and singular the rights, privileges, exemptions, franchises, property (real, personal and mixed), licenses, easements and interests of every kind, nature and description belonging to or in any way appertaining to said consolidating corporations, and each of them, shall be vested in and be the property of said consolidated corporation, and it shall succeed to and there shall attach to it all of the debts, obligations, contracts, tariffs, and any and all liabilities of each of the consolidating corporations.

"The foregoing shall not be deemed to exclude any other effects, rights or privileges provided by law as incident to or resulting from any such consolidation and not herein specifically mentioned."

Either the plaintiff or the defendant may refer to such parts of said lease or said agreement of consolidation as they may desire and may incorporate such parts thereof in [fol. 4] their brief as though both of said instruments were fully printed as part of this Bill of Exceptions.

The plaintiff then offered in evidence the agreement dated the 25th day of October, 1899, between the defendant and the Boston & Albany Railroad Company, which is the agreement upon which the plaintiff bases its right to recover in this action, which agreement was marked "Exhibit 3," a copy of which is hereto annexed and made a part of this Bill of Exceptions.

The defendant admitted said instrument contained the signature of the party whom the declaration alleged it to be.

The defendant admitted the execution of said agreement, but not the authority of the persons whose signatures appear thereon to bind the corporation, and said agreement was admitted subject to the objection and exception of the

defendant upon the above question of authority merely, no other objection or exception being urged.

Bills rendered to the Central New England Railway Company by the Boston & Albany Railroad, New York Central & Hudson River Railroad Company, Lessee, from September 12, 1902, until some time in 1914 and by the Boston & Albany Railroad, New York Central Railroad Company, Lessee, from 1914 to December 15, 1921, in each instance were approved and paid by the Central New England Railway Company. Payments so made were for operations of the Central New England Railway Company and miscellaneous services performed for it at Springfield; they were all of the charges made by the Boston & Albany Railroad (New York Central & Hudson River Railroad Company or New York Central Railroad Company, Lessee, as the case may be) to the Central New England Railway Company on account of the Springfield operation until December 15, 1921. The defendant has not operated into Springfield nor made any payments to the plaintiff since December 15, 1921. All of the payments made up to that time were made to the New York Central [fol. 5] Railroad Company or its corporate predecessor, lessee of the Boston & Albany, on bills rendered by the New York Central Railroad Company or its corporate predecessor. All charges made against the Central New England Railway Company up to and including December 15, 1921, were paid as above set out. Attached hereto is Exhibit 5, which is typical of the bills rendered and paid as above set forth.

A notice to admit facts under section 69 of the Practice Act was delivered by the plaintiff to the defendant and filed in court. The sections of this notice offered by the plaintiff were as follows:

"Notice to Admit Facts under Rule 37

Take notice that the plaintiff in this case requires the defendant to admit or deny for the purposes of this case only the several facts respectfully hereunder specified and the defendant is hereby required within the time provided in Rule 37 of the Superior Court to admit or deny the said

several facts, saving all just exceptions to the admissibility of such facts as evidence in this case.

Lowell A. Mayberry, Attorney for the Plaintiff.

Dated January 8, 1927.

To Choate, Hall & Stewart, Attorneys for Defendant.

The facts the admissibility of which is required are:

* * * * * * *

4. That subsequent to 1900 the Central New England Railway Company until December 15, 1921 made the payments called for under said agreement to the New York Central Railroad Company.

5. That on and after December 15, 1921 the Central New England Railway Company ceased making the payments called for by said agreement and declined to further perform the same."

In response to the above notice the defendant filed the following qualified admission of facts pursuant to notice under Rule 37:

"Qualified Admission of Facts Pursuant to Notice under Rule 37

The defendant in this case for the purposes of this case only hereby admits the several facts respectively hereunder specified, subject to the qualifications and limitations hereunder specified, and saving all just exceptions to the admissibility of any such facts or any of them as evidence in this [fol. 6] case.

Provided that this admission is made for the purposes of this case only and is not an admission to be used against the defendant on any other occasion or by any other than the plaintiff.

Choate, Hall & Stewart, Attorneys for the Defendant.

January 19, 1927.

To Mayberry, Hallowell & Mayberry, Attorneys for the Plaintiff.

* * * * * * *

(4) The defendant denies that subsequent to 1900 the Central New England Railway Company until December 15, 1921, made the payments called for under said agreement to the New York Central Railroad Co.

The defendant admits that payments covering operation under the agreement of October 25, 1899, from September 12, 1902, to December 15, 1921, were made by the Central New England Railway Company to the Boston & Albany Railroad Company (New York Central & Hudson River Railroad Company, lessee) until sometime in 1914 and to the Boston & Albany Railroad Company (New York Central Railroad Company, lessee) from 1914 to 1921. Said payments were for the total amount and were all of the charges made by the Boston & Albany Railroad Co. (New York Central & Hudson River Railroad Company or New York Central Railroad Company, lessee, as the case might be) on account of operation under the agreement of October 25, 1899, from that date until December 15, 1921.

(5) The defendant denies that on and after December 15, 1921, the Central New England Railroad Company ceased making the payments called for by said agreement and declined to further perform the same.

The defendant has not operated under the agreement of October 25, 1899, nor made payments under the same since December 15, 1921.

The following colloquy then took place:

Mr. Mayberry: If my brother admits that the payments were made to the lessee——

Mr. Hall: Well, I don't,—all I meant to say was that the [fol. 7] use of the word "Company" had no significance as distinguished from the Railroad.

The Court: Well, all right. But do you put the plaintiff upon its proof that these payments were in fact made?

Mr. Hall: No, they made the payments, we have admitted it in the answers to the notice to admit.

Howard M. Biscoe, a witness called by the plaintiff, for thirteen years vice-president of the New York Central Railroad Company, in charge of the leased line of the Boston & Albany Railroad, testified that he was familiar to some extent with the trackage agreement (Exhibit 3) between the New York Central or Boston & Albany, and the Central New England Railway Company.

On or about November 9, 1921, Mr. Biscoe received the following letter (Exhibit 7) from Mr. C. L. Bardo, president of the Central New England Railway Company, and general manager of the New York, New Haven & Hartford Railroad Company:

EXHIBIT 7

"Central New England Railway Co.

C. L. Bardo, President

New Haven, Connecticut, November 9, 1921.

Mr. H. M. Biscoe, Vice President, Boston & Albany Railroad, N. Y. C. R. R. lessee, Boston, Massachusetts.

DEAR SIR: Please take notice that this Company will discontinue operation of its lines north of Feeding Hills station, and between there and Agawam Junction, effective December 15, 1921. At said date this Company will cease to make use of the license and permission acquired by it by virtue of contract with your Company of October 25, 1899, and will discontinue payments thereunder as of said date.

The above discontinuance of operation is by virtue of certificate of the Interstate Commerce Commission, Division 4, dated September 8, 1921, in the matter of application of the Central New England Railway Company for a certificate of public convenience and necessity, Finance Docket #1479.

[fol. 8] If any questions of detail arise in connection with the discontinuance, they may be taken up and settled by mutual agreement between representatives of the two Companies.

Yours very truly, Central New England Railway Company, by (Signed) C. L. Bardo, President and General Manager."

SFM. K.

On November 11, 1921, Biscoe replied to Bardo by a letter (Exhibit 8):

EXHIBIT 8

Boston & Albany Railroad, N. Y. C. R. R. Co. Lessee, South Station

H. M. Biscoe, Vice-President

BD. Boston, Mass., November 11th, 1921.

Mr. C. L. Bardo, President & General Manager Central New England Railway Company, New Haven, Ct.

DEAR SIR: Referring to yours of the 9th in which you give notice of canceling the contract dated October 25, 1899, between your Company and ours for the uso ef our railroad between Agawam Junction and Springfield.

Will you kindly refer me to the clause in this contract under which you feel that you can give the notice given in your letter of the 9th.

Yours ruly, (Signed) H. M. Biscoe, Vice-President.

On November 21, 1921, Bardo telegraphed (Exhibit 9) Biscoe that on account of the discontinuance of Central New England operation, effective December 15, extensive repairs now being made by the Boston & Albany at Agawam Junction were unnecessary. On the same day Bardo wrote Biscoe a letter confirming the telegram, Exhibit 10. Mr. Biscoe replied to the telegram on November 22, 1921, by [fol. 9] letter (Exhibit 11):

EXHIBIT 11

Boston & Albany Railroad, N. Y. C. R. R. Co. Lessee, South Station

H. M. Biscoe, Vice-President

BD.

Boston, Mass., November 22, 1921.

Mr. C. L. Bardo, President Central New England Rly., New Haven, Conn.

DEAR SIR: Referring to your wire of the 21st:

The renewals at the tower at Agawam Junction have been in process for some time but were stopped on receipt of your letter of November 9th.

Will you kindly refer to my letter of November 11th and refer me to the clause in the contract under which you feel that you can give the notice given in your letter of the 9th. An early reply is requested.

Yours truly, (Signed) H. M. Biscoe, Vice-President.

On November 25, 1921, Mr. Biscoe received the following letter (Exhibit 12) from Mr. Bardo, which was dated November 21, 1921, and which was admitted subject to the objection and exception of the defendant:

EXHIBIT 12

Central New England Railway Company, Office of the President

C. L. Bardo, President

"Perfect Package Month"

New Haven, Conn., Nov. 21, 1921.

Mr. H. M. Biscoe, Vice-President Boston & Albany Railroad Company, Boston, Mass.

[fol. 10] DEAR SIR: Yours of the 11th instant at hand in connection with our notice in reference to the contract of October 25, 1899.

I do not know of any clause in the contract specifically authorizing us to give such notice. The contract however is one requiring your company to license and permit the Central New England Railway Company to do certain things up to 1940, but it does not require the Central New England Railway Company to make use of that license and permit during the whole of the term.

Yours truly, (Signed) C. L. Bardo, President.

On December 14, 1921, Mr. Biscoe replied (Exhibit 13) to Mr. Bardo's letter (Exhibit 12). His reply, which was as follows, was admitted subject to the objection and exception of the defendant:

EXHIBIT 13

Boston & Albany Railroad, N. Y. C. R. R. Co., Lessee, South Station

H. M. Biscoe, Vice-President

BD.

Boston, Mass., December 14, 1921.

Mr. C. L. Bardo, President Central New England Railway Co., New Haven, Conn.

DEAR SIR: Referring to yours of November 21st, in regard to the contract between your company and ours for trackage rights over our line from Agawam Junction to Springfield:

This contract gives your company a license to use our line until August 30th, 1940, and to pay us certain sums for the use of our line. There is, however, nothing in the contract that gives you any right to terminate it until its expiration date or to cease paying us the amounts named in the contract. Of course if you do not care to make use of the license that is your affair but does not affect the payments to us and we cannot accept your notice of November 9th that you will discontinue payments under the contract.

If your company desires to terminate the contract, we are prepared to meet with you at your convenience to consider under what, if any, terms the contract shall be cancelled.

Yours truly, (Signed) H. M. Biscoe, Vice-President.

[fol. 11] On December 29, 1921, Mr. Biscoe wrote Mr. Bardo a further letter (Exhibit 14), which was as follows:

EXHIBIT 14

Boston & Albany Railroad, N. Y. C. R. R. Co., Lessee, South Station

H. M. Biscoe, Vice-President

C/J. 15.06.

Boston, Mass., December 29, 1921.

Mr. C. L. Bardo, President Central New England Railway Company, New Haven, Connecticut.

DEAR SIR: I would appreciate a reply to my letter of December 14th, with regard to the contract between your company and ours for trackage rights over our line from Agawam Junction to Springfield.

Yours truly, (Signed) H. M. Biscoe, Vice-President.

On January 4, 1922, Mr. Biscoe received the following letter (Exhibit 15) from Mr. Bardo, which was admitted subject to the objection and exception of the defendant, and reads as follows:

EXHIBIT 15

Central New England Railway Company, Office of the President

C. L. Bardo, President

New Haven, Ct., Jan. 3rd, 1922.

Mr. H. M. Biscoe, Vice-President Boston & Albany Railroad, Boston, Mass.

DEAR SIR: Referring to your letters of December 14th and 29th, relative to contract covering use of tracks between Agawam Jct. and Springfield.

[fol. 12] As we look at the matter the contract has been terminated by virtue of our notice to your Company effective December 15th and therefore we feel that we cannot

consistently take up with you any question as to the terms upon which the contract "shall be cancelled."

As we view the matter, the Central New England Railway Company never agreed in writing or otherwise to continue the use of the tracks of your Company to 1940 or any other definite time. It did agree, however, to pay $15,000 as an annual compensation for the use of your tracks, and this it has done.

It seems to be clearly and forcibly implied, from the language of the agreement, that the Central New England Railway Company was required to pay a fixed rate for as long as it saw fit to use the tracks, and having discontinued the use of track upon proper notice, it does not recognize any further liability under the contract.

This letter is, of course, without prejudice.

Very truly yours, (Signed) C. L. Bardo, President.

On January 6, 1922, Mr. Biscoe wrote the following letter (Exhibit 16) to Mr. Buckland, who was then the Vice-President and General Manager of the Central New England Railway Company:

EXHIBIT 16

Boston & Albany Railroad, N. Y. C. R. R. Co., Lessee, South Station

H. M. Biscoe, Vice-President

BD.

Boston, Mass., January 6th, 1922.

Mr. E. G. Buckland, Vice-President & General Counsel Central New England Rly. Co., New Haven, Conn.

DEAR SIR: We have a contract with the Central New England Railway Company, dated October 25th, 1899, which provides that until August 30th, 1940, we give the Central New England a license to use our line, for which right they agree to pay us $15,000 a year.

[fol. 13] The Central New England has ceased to exercise this right and Mr. Bardo notified me that the contract

is cancelled. We find nothing in the contract which gives any right to the Central New England to cancel. The right to use, of course, is optional. I asked Mr. Bardo if he would kindly advise me under what clause of the contract he felt he could give notice of cancellation of the contract and he advised that he knew of no clause authorizing him to give us such a notice. I then said to him that if he desired to terminate the contract we were prepared to meet with him to consider under what, if any terms the contract should be cancelled and I am now advised that he does not care to discuss the matter and that he regards the contract as cancelled "by virtue of our notice to your company," although he has already advised me that he knew of no clause in the contract which would permit him to cancel it. You can well understand that this is not satisfactory to us. Before we take such action as in our opinion may be necessary to protect our interest it seemed only fair that I refer the matter to you to inquire if you felt from a legal standpoint that you could cancel this contract, and I would appreciate it very much if you would let me hear from you.

For reference I refer you to Mr. Bardo's letters of November 9th, November 21st, 1921, and January 3rd, 1922, and my letters of November 11th and December 14th, 1921.

Yours truly, (Signed) H. M. Biscoe, Vice-President.

On January 20, 1922, Mr. Biscoe received the following letter (Exhibit 17) from Mr. Buckland, dated January 18, 1922:

EXHIBIT 17

Central New England Railway Company, Office of the President

E. G. Buckland, Vice-President

January 18th, 1922.

hs.

Mr. H. M. Biscoe, Vice-President Boston and Albany Railroad, South Station, Boston, Mass.

DEAR SIR: Answering your inquiry of January the 6th with respect to the instrument which gives the Central New

England Railway Company a license to operate over your line until August 30th, 1940, upon the payment of $15,000 per year.

If this is a license it is not necessary that there should [fol. 14] be any proviso for cancellation. It is in the power of the licensee to stop availing itself of the license and the obligation to pay therefor unless the license is coupled with an interest in the property which substantially changes the character of the transaction.

This instrument was executed prior to The New York, New Haven and Hartford Railroad Company coming into control of the Central New England Railway Company. The facts and circumstances surrounding its execution indicate that it was the desire of the Boston and Albany thus to establish a competitive route. The Central New England, however, was compelled to assume the expense of all changes which were made as a condition of operating over the tracks of the Boston and Albany between Agawam Junction and Springfield. In these circumstances the instrument seems to have all the earmarks of a license and none of a contract imposing obligation upon the licensee. This being so and the licensee being at liberty to terminate the license at its pleasure it has simply availed itself of its rights.

The above is a brief statement of how the situation looks to us, but if you are not in accord with that view I agree with you that a conference is desirable, and if Mr. Bardo agrees with me we shall be glad to arrange the same.

Yours very truly, (Signed) E. G. Buckland, Vice-President & General Counsel.

On January 20, 1922, Mr. Biscoe replied to Mr. Buckland's letter (Exhibit 17) by the following letter (Exhibit 18), which was admitted subject to the defendant's objection and exception:

EXHIBIT 18

Boston & Albany Railroad, N. Y. C. R. R. Co. Lessee,
South Station

Boston, Mass., January 20th, 1922.

CC to Mr. G. H. Fernald, Jr.

Mr. E. G. Buckland, Vice-President & General Counsel,
Central New England Railway, New Haven, Conn.

DEAR SIR: In reply to your letter of the 18th inst. with reference to the agreement of October 25, 1899, between the Boston & Albany Railroad Company and the Central New England Railway Company, I am advised that the agreement did not create a license revocable at the pleasure [fol. 15] of the licensee. It is also clear from this agreement and the earlier agreement of May 9, 1898, that the right created was not sought by the Boston & Albany, but by the parties who were reorganizing the Philadelphia, Reading & New England Railroad Company.

I understand from your letters, from previous letters from Mr. Bardo, President of the Company, and from the failure of the Railway Company to meet the payment due in accordance with the terms of the agreement, that the Central New England Railway Company repudiates its obligations under the contract.

Consequently I wish to give you notice that The New York Central Railroad Company, as successor to the rights of the Boston & Albany Railroad Company under the agreement, will hold the Central New England Railway Company to the contract.

If you wish to discuss this matter we will be glad to meet you.

Yours truly (Signed) H. M. Biscoe.

At the time of the admission of Exhibit 18 the Court made the following observation to the jury:

"The Court: In connection with that last letter, Mr. Foreman and gentlemen of the jury, in view of the objection made and the ruling of the Court that it is admissible,

I think it is my duty to instruct you that it, of itself, in the absence of any admissions on the part of the defendant, is not evidence of the doings or wishes of the Philadelphia Company."

On February 7, 1922, Mr. Biscoe again wrote Mr. Buckland (Exhibit 19) as follows:

EXHIBIT 19

Boston & Albany Railroad, N. Y. C. R. R. Co. Lessee, South Station

H. M. Biscoe, Vice-President

Boston, Mass., February 7, 1922.

C/J. 15.06.

Mr. E. G. Buckland, Vice-President and General Counsel Central New England Railway, New Haven, Conn.

DEAR SIR: I would appreciate a reply to my letter of January 20th, with reference to agreement of October 25, 1899, [fol. 16] between the Boston & Albany Railroad Company and the Central New England Railway Company.

Yours truly, H. M. Biscoe, Vice-President.

On February 11, 1922, Mr. Biscoe received the following reply (Exhibit 20) from Mr. Buckland, dated February 10, 1922:

EXHIBIT 20

Central New England Railway Company, Office of the President

E. G. Buckland, Vice-President

bs.

February 10th, 1922.

Mr. H. M. Biscoe, Vice-President Boston and Albany Railroad, South Station, Boston, Mass.

DEAR SIR: Answering yours of February the 7th asking for a reply to yours of January the 20th with reference to

the Central New England Railway trackage between Agawam Junction and Springfield.

Your letter of January 20th did not in terms call for a reply. I sent a copy of it to the President of the Central New England Railway Company, Mr. C. L. Bardo, and to Mr. F. A. Farnham, Counsel at Boston, and I assume that they will in the near future write to you suggesting a discussion of the matter.

Yours very truly, E. G. Buckland, Vice-President & General Counsel.

On March 17, 1922, Mr. Biscoe wrote the following letter (Exhibit 21) to Mr. F. A. Farnham, counsel for the New York, New Haven & Hartford Railroad Company, but received no reply from him:

EXHIBIT 21

Boston & Albany Railroad, N. Y. C. R. R. Co. Lessee, South Station

Boston, Mass., March 17th, 1922.

BD.

H. M. Biscoe, Vice-President

[fol. 17] Mr. F. A. Farnham, Counsel N. Y. N. H. & H. R. R., Boston, Mass.

DEAR SIR: You were here on February 23rd in regard to the contract of the Central New England to use our track between Agawam Junction and Springfield.

I would appreciate very much a reply from you as to the position of your Company. This matter has now been before your Company something over three months and we would like to get it settled.

Yours truly, (Signed) H. M. Biscoe, Vice-President.

Since December 15, 1921, the defendant has made no payments under the agreement (Exhibit 3).

* * * * * * *

On cross-examination the witness testified as follows:

* * * * * * *

A plan of the Springfield yard and surrounding tracks as of January 1, 1922, was then admitted in evidence as Exhibit 22, which is hereby referred to and made a part of this Bill of Exceptions, but need not be printed.

* * * * * * *

The witness: * * * There were some changes in the Springfield yard, work on which began in 1918. The condition of the main line tracks through the station was substantially the same from 1902 up to 1918 when the changes began but they made some changes in the tracks in the Liberty Street yard between 1902 and 1921.

* * * * * * *

The defendant then offered a colored map of Southern New England and the eastern part of the State of New York, showing in different colors the lines of the New York, New Haven & Hartford Railroad Company, the Central New England Railway Company, the Boston & Albany Railroad Company, the New York Central Railroad Company, and other carriers west of the Hudson River. This map, to the accuracy of which no objection was made by either party, was admitted as Exhibit 23 solely for the pur-[fol. 18] poses of showing how the Boston & Albany Railroad and the Central New England Railway came into Springfield. This exhibit may be referred to, but need not be printed.

The Witness: There was no station on the Central New England between Feeding Hills and Springfield and Agawam Junction was just a point where the Central New England intersected with the Boston & Albany, New York Central & Hudson River, or New York Central, Lessee.

* * * * * * *

It is four miles from Agawam Junction to the Union Station at Springfield and about three miles from Agawam

Junction to the West Springfield yards, so that it is about one mile from West Springfield yard to Union Station.

I understood from the letter of November 9, 1921 (Exhibit 7) that the reason Mr. Bardo gave for the discontinuance of operation over the lines of the New York Central was by virtue of a certificate of the Interstate Commerce Commission permitting the abandonment on the part of the Central New England. I do not recall that the subject of the discontinuance by the Central New England had ever been discussed by me with representatives of the Central New England before November 9, 1921. Mr. Bardo said there had been a certificate of the Interstate Commerce Commission permitting the discontinuance of operation and I had no reason to doubt what he said. I don't think I consulted with our counsel, Mr. Fernald, before replying to Mr. Bardo's first letter (Exhibit 7). I asked Mr. Bardo in the letter dated November 11, 1921 (Exhibit 8) for the clause in the contract, as I expressed it, under which Mr. Bardo felt he could give notice, and again, on November 22d, I asked him to state the clause in what I called the contract under which he felt that he could give notice. Mr. Bardo in his letter of November 21st, 1921 (Exhibit 12), stated that he did not know of any clause in the contract specifically authorizing him or his counsel to give such a notice. When Mr. Bardo said he was going to cancel I [fol. 19] wanted to find out what he relied on and why he was going to do it. I had not discussed the matter with Mr. Fernald, our counsel, at that period. I discussed the matter with Mr. Fernald, my counsel, at some later time and I think some of the letters were a joint result of our joint efforts. In the same letter that I asked Mr. Bardo to tell what clause he was acting under I suggested a meeting to consider under what terms the contract should be cancelled. On January 6, 1922, as a result of a conference with Mr. Fernald I wrote Mr. Buckland, the vice-president of the Central New England Company, the chief law officer of the New York, New Haven and Hartford Railroad. I wanted to sit down and talk about this thing; that had been my desire from the start. I had a talk with Mr. Farnham at lunch one day and I told him that Mr. Buckland had suggested that we talk about this matter and as I recall it he didn't seem to have anything to say at all. The conversa-

tion was very brief. I suggested to Mr. Farnham that it might be worked out that we have a bigger share of the traffic rates between Boston and New York in exchange for cancelling this contract. I offered to do that at this time. I thought, at this time of getting a greater share of the rate between Boston and New York over the Springfield line. That was something that I thought of what we might do. It was not the purpose of my meeting with them nor was it my purpose from the beginning. I wanted to sit down and discuss this matter, which they refused to do. I don't think that I made any other proposition to Mr. Farnham than that the Albany should be given a greater share of the through business between Boston and New York on the Springfield line. I suggested that to him, not as a proposition but something we might talk about. If that were done I don't know whether we would or not forget the Central [fol. 20] New England.

The defendant then moved that all the correspondence after the letter of November 9, 1921, be stricken from the record. This motion was based upon the defendant's contention that the letters were written for settlement purposes and included an expression of the legal relations of the parties.

The Court: The motion is denied and in connection therewith, Mr. Foreman and gentlemen, you will understand that the letters have been admitted solely upon the question whether the defendant Railroad Company abandoned the contract that it had with the plaintiff Railroad Company, and for no other purpose.

The Court also denied the motion of the defendant that the letter of January 3, 1922 (Exhibit 15) be stricken from the record, which motion was based upon the fact that said letter was written in answer to an inquiry on the part of Biscoe to get someone to commit himself as to some clause in the contract and contained the words "This letter of course is without prejudice." To the denial of this motion the defendant's exception was duly saved.

On redirect examination the witness testified as follows:

* * * * * * *

The Central New England first began to operate trains over this branch on September 15, 1902, and from then until May 28, 1904, three round trips week days and two round trips Sundays were operated. These were mixed trains. From May 29, 1904, to June 20, 1908, two round trips week days were operated by the Central New England. These were mixed trains. A mixed train is a combination of freight and passenger, a freight train with one or more passenger cars attached to it. From June 21, 1908, to June 5, 1915, the Central New England operated two mixed train round trips week days. From June 6, 1915, to June 23, 1917, two mixed train round trips were operated [fol. 21] week days and from June 24, 1917, to December 14, 1921, inclusive, the Central New England operated one round trip mixed train week days and none Sundays.

* * * * * * *

* * * The New York, New Haven & Hartford Railroad Company, both before and after December 15, 1921, had a line in Springfield and had the same connection with the coal fields and other shippers in the West and Southwest as the Central New England had.

James L. Treuden, a witness called by the plaintiff, testified as follows:

I have been general superintendent of the Boston & Albany Railroad Company, New York Central Railroad, lessee, since February 1, 1910. In 1902, at the time the Central New England began operating, I was train dispatcher at Springfield and remained such until October, 1904. After that I was made assistant train master superintendent, and general superintendent in February, 1910, and have remained so ever since. * * * On October 28, 1914, as a result of correspondence, the New Haven took over the care of the engine at their engine house on their property and the care of the passenger cars in the New Haven yard. The freight cars were handled as they always were. * * * Our facilities at Springfield and between Springfield and Agawam Junction in 1921 were sufficient to take care of the traffic of the New York Central as well as the traffic of the Central New England. * * *

On cross-examination the witness testified as follows:

* * * The New York, New Haven & Hartford Railroad enters Springfield from the south and their yard was located on the east and west side of their main lines parallel with the river. The main lines of the New York, New Haven & Hartford Railroad are on the south side of the Albany tracks. Their main track enters our main track [fol. 21a] and their trains go over our tracks in an easterly direction to the Springfield station. The Boston & Maine Railroad comes into the Springfield terminal from the north and they had a storage yard on the east and west side of their main track. The tracks of the Boston & Maine join the Boston & Albany tracks and their trains go into the Springfield station over our tracks.

There was a single connection across the line of the Albany running north and south and connecting the Boston & Maine and the New Haven.

* * * * * * *

The witness was then shown a blueprint of the connection between the New York Central and the Central New England, which was admitted as Exhibit 25. This plan showed the cross-over, switches, and 140 feet of track removed on May 15, 1922, from the switch point up to the so-called maintenance joint which was agreed to by the section foreman. The remaining 129 feet to the property line was removed by the New York Central October 6, 1922. The yellow indicates the removal of the tracks themselves. The property of the Central New England is shown beyond the broken line to the south.

The Witness: The effect of this removal was to physically prevent any trains of the Central New England upon the tracks of the Albany line unless they run their trains on the ground. That is why we took the rails up. The tower is still there.

* * * * * * *

East and west through Agawam Junction in December, 1921, I would say that there were fifteen passenger trains each way and I would say that about seventy per cent. of the trains were freight trains.

* * * * * * *

I would say that east of Springfield the percentage of freight trains would run down to about forty per cent. going from West Springfield east through the terminal.

* * * * * * *

[fol. 22] Henry J. Curry, another witness called by the plaintiff, testified as follows:

I am superintendent at Springfield for the New York Central Railroad Company, Boston & Albany Division. * * * The facilities of the New York Central at Springfield and on the Boston & Albany Division were adequate to take care of their own trains and to take care of six round trips of trains of the Central New England.

On December 10, 1921, I received a letter from Mr. Cuineen. This letter was admitted as Exhibit 26, and is as follows:

Exhibit 26

Copy

File A 1

The New York, New Haven & Hartford Railroad Company,
The Central New England Railway Company

Danbury, Conn., Dec. 10, 1921.

Mr. H. J. Curry, Supt. Boston & Albany Railroad, Springfield, Mass.

Dear Sir: Effective Dec. 15th, 1921, the Central New England Railway will discontinue operation of train service over your line between Agawam Junction and Springfield.

After the arrival of train 980 at Springfield, Dec. 14th, the train and engine crew and outfit will be run extra Springfield to Winsted, and after the above time we will not require the service of the tower or tower men at Agawam Junction.

Our accounting department will arrange to close up our freight and ticket accounts, and the C. N. E. Railway will

not participate in any further expense covering at your terminal.

Your very truly, (Signed) J. W. Cuineen, Superintendent.

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* * * * * * *

On or about April 26, 1922, I received a communication from Mr. Cuineen that he had removed the rails several hundred feet east of the east end of the Agawam Bridge, in order to prevent any possibility of cars getting away and fouling the main line of the New York Central, and to prevent any possibility of accident. The rail which Mr. Cuineen moved was on the branch line of the Central New England connecting with our main line, so that after April 26, [fol. 23] 1922, it was physically impossible for the Central New England to operate any trains over its line to its connection with the New York Central at Agawam Junction. At no time to my knowledge was this rail ever replaced by the Central New England.

* * * * * * *

In addition to Exhibit 22 a larger plan of the tracks and facilities at Springfield in 1921 was introduced in evidence as Exhibit 29, which is hereby referred to and made a part of this bill but need not be printed.

Witnesses for both plaintiff and defendant identified the various things shown on this plan in the same way that Messrs. Biscoe and Truden explained Exhibit 22 and subsequent witnesses referred to this exhibit during their testimony.

The freight house of the Boston & Albany Railroad is east of the station on the north side of the tracks. There is a freight yard adjacent to this house near Webster and Chestnut Streets. The Summer Street yard, which is the passenger yard, is entirely south of the main line tracks opposite the freight yard. Tower 40 is on the north side of the tracks between the station and the freight house. Tower 41 is at the west end of the station.

In the Springfield station the most northerly track is No. 5, which is the Boston & Maine track. The next southerly track is No. 3, a run-around freight track, which extended west to the Connecticut River Bridge. The next southerly is No. 1, the main line passenger west-bound, the next No. 2, the main line passenger east-bound. Both these tracks extend for miles in either direction. The next southerly track is No. 4, which is sometimes called the New Haven spur because up to 1922 it ran through the New Haven yard but not through the Boston & Albany station. It began again east of the station. Three tracks from the New Haven railroad yard joined tracks 2 and 4 from the south at the west [fol. 24] end of the station.

* * * * * * *

The engineer also testified that the distance from Tariffville, Connecticut, to Springfield is eighteen and a fraction miles and from Agawam Junction to Tariffville fourteen and a fraction miles.

* * * * * * *

* * * Mr. Edward E. Regan, a general superintendent of the New York, New Haven & Hartford Railroad Company and superintendent of the Central New England Railway Company * * * testified that the line of the Central New England from Feeding Hills to Agawam Junction is abandoned for service or operation, * * *.

* * * * * * *

A letter from Mr. Curry to Mr. Truden dated April 27, 1922, was then received in evidence as Exhibit 31 and is as follows:

Exhibit 31

File 15.06

Boston & Albany Railroad, N. Y. C. R. R. Co. Lessee

1-2. Springfield, April 27, 1922.

Mr. J. L. Truden, General Superintendent.

Dear Sir: Our conversation this morning in regard to removing a rail on the C. N. E. south of Agawam Junction to protect cars from running down to foul our main line.

Superintendent Cuineen, under date of April 26th, advised that they had already removed a rail several hundred feet east of the east end of Agawam Bridge in order to prevent any possibility of the cars getting away and fouling our main line.

Yours truly, H. J. Curry, Superintendent.

TGW.

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* * * * * * *

[fol. 25] OFFERS IN EVIDENCE

The defendant then formally offered the report and certificate of the Interstate Commerce Commission in Finance Docket No. 1497 as already offered in connection with the Motion to Dismiss as Exhibit A. This document was admitted in evidence and marked Exhibit A and is attached hereto.

The defendant then made the following offers of proof which were rejected by the Court and the defendant's exceptions thereto duly saved.

Defendant Central New England Railway offers to show that the system of the New York, New Haven & Hartford Railroad Company, as a part of which it is operated, did, during the calendar years 1921 to 1925, according to the valuations placed on the properties of the system by the Interstate Commerce Commission, adjusted each year after betterments and improvements, earn as a net railway operating income the following percentages: 1921, .84; 1922, 2.78; 1923, 3.02; 1924, 4.23; 1925, 4.75.

* * * * * * *

The defendant rested.

The plaintiff in rebuttal then offered a photostatic copy of the entire record of the proceedings before the Interstate Commerce Commission upon the application of the Central New England Railway filed June 15, 1921, being the proceedings as a result of which the Order, Exhibit A, was entered. The papers consisted of the application, the returning questionnaire, and the report and certificate of the Commission, said report and certificate being merely copies

of what the defendant has introduced as Exhibit A. The only new thing in the record being the application and the questionnaire. These papers were all admitted in evidence [fol. 25a] marked Exhibit 32 and the defendant's exception thereto duly noted, it being understood that no objection was made by the defendant on the ground of informality of proof and that the objection runs to the subs ance of the evidence offered. Exhibit 32 is hereto annexed.

* * * * * * *

Clyde E. Sturdivant testified that he was a brakeman in the employ of the Central New England from 1899 to 1904 and has since been in the employ of the Boston & Albany and that he served on a freight train of the Central New England for about a year following September 15, 1902 (the date of commencement of operations of the Central New England into Springfield), which train made two round trips from the West Springfield yard to Tariffville each day. On the average this train carried ten or twelve cars and on one occasion thirty cars. After the cessation of this freight service in 1903 the witness acted as brakeman on the passenger train of the Central New England from Springfield.

* * * * * * *

The plaintiff then offered the lease of the Hartford & Connecticut Western Railroad Company to the Central New England Railway Company.

Colloquy Between Court and Counsel.

Mr. Hall: I don't see the materiality of it, if the Court please.

Mr. Mayberry: I don't know that there is any materiality to it unless the argument be made at some time that this company had no right to make any such contract because they had no right to come into the Commonwealth of Mas- [fol. 26] sachusetts without Act of the Legislature and I offer that for that purpose.

The Court: Of course you disclaim any such argument as that?

Mr. Hall: Oh, no, your Honor, if that is offered for that purpose I prefer to have it go in rather than disclaim it.

The Court: Oh, you do? Then it may go in.

Mr. Mayberry: I assumed that was so.

Subject to the defendant's exception, a photographic copy of this document was admitted in evidence as Exhibit 34.

Mr. Mayberry: I call your Honor's attention to the date of the lease February 4, 1890, and the term of the lease which is for fifty years next consecutively ensuing from and after the 30th day of August, 1890, and in that connection I call your Honor's attention to the fact that that would cause this lease to expire on August 30, 1940, which is the time of the expiration of the traffic agreement in this case.

Mr. Mayberry: There is no question between us, is there, Brother Hall, but that the Central New England Railway Company is the present lessee or assignee of the lessee of this lease, the lessee here appearing to be the Central New England & Western Railroad Company, which I understand there is no question is the Central New England Railway Company?

Mr. Hall: No.

The plaintiff also offered the Special Act of the Massachusetts Legislature for the year 1899, Chapter 386, being an act to authorize the Hartford & Connecticut Western Railroad Company to extend its road into Massachusetts.

* * * * * * *

The defendant then duly made a motion in writing as follows that a verdict be directed for the defendant:

[fol. 27] Defendant's Motion for Directed Verdict

Now comes the defendant in the above entitled case and moves that the Court direct a verdict in its favor.

By Its Attorneys, (Signed) John L. Hall, Marcien Jenckes."

The Court denied this motion and the defendant's exception thereto was duly saved.

PLAINTIFF'S REQUESTS

* * * * * * *

22. As matter of law, the fact that on or about September 8, 1921, the Interstate Commerce Commission issued the certificate of public convenience and necessity to the defendant, a copy of which is set out in the defendant's answer, and that in pursuance of and in reliance on said certificate the defendant abandoned its line of railroad extending from Feeding Hills in the town of Agawam to its connection with the Boston & Albany Railroad and ceased the operation of trains over this line into the city of Springfield by way of the plaintiff's tracks does not constitute a defense to this action.

* * * * * * *

The Court granted each of these requests and the defendant's exceptions to the granting of them were duly saved by the Court.

DEFENDANT'S REQUESTS

1. Upon all the evidence the plaintiff is not entitled to recover.

* * * * * * *

The defendant then renewed its Amended Motion to Dismiss on jurisdictional grounds and the Court directed the Clerk to make the entry as of that day, "Motion again renewed and denied, to which order the defendant excepts."

CHARGE TO JURY

Charge by CALLAHAN, J.:

MR. FOREMAN AND GENTLEMEN: On October 25, 1899, the Central New England Railway Company and the Boston & Albany Railroad Company entered into a written agree-

ment, the alleged violation of which gave rise to this action. The agreement tacitly stated provided that the Boston & Albany Railroad Company would license and permit the de- [fol. 28] fendant, the Central New England Railway Company, to use its tracks for certain purposes stated in the agreement and that it would do certain other specific things for the sum of fifteen thousand dollars per year until August 30, 1940. The agreement was to go into effect so far as the use of the Boston & Albany's tracks were concerned and the rights of the Central New England Railway Company were concerned from and after the opening of a branch line which the Central New England Railway Company intended to build from Tariffville to a point at or near West Springfield. As suggested, the Central New England Railway Company bound itself to pay to the Boston & Albany Railroad Company the sum of $15,000 annually during the term of the contract and certain other sums for special switching service in connection with the Boston & Maine Railroad and the New York, New Haven & Hartford Railroad Company and from West Springfield to Springfield the line opened for the operation of the Central New England Railway Company on September 15, 1902, and from that time on the Central New England Railway Company paid the annual sum due up to December 15, 1921. On the latter date in accordance with a notice forwarded to the Boston & Albany, to the New York Central Railroad Company, the lessee of the Boston & Albany Railroad, the Central New England Railway Company ceased to operate the Boston & Albany Railroad and from that day it notified the Boston & Albany Railroad Company it would cease to pay $15,000 or any other sum thereafter for whatever rights it might have had under the contract.

Subsequent to the opening of the line the Boston & Albany Railroad Company was leased to the New York Central Railroad Company and the latter company by virtue of these lease rights is the plaintiff in this action. At this point I instruct you as follows: As a matter of law, the execution of [fol. 29] the agreement and supplemental agreement of November 15, 1899, leasing to the New York Central and Hudson River Railroad Company for a period of ninety-nine years from July 1, 1900, the railroad system and equipment of the Boston & Albany Railroad Company does not constitute a defense to this action.

As a matter of law, the plaintiff as lessee or assignee of the lessee of the Boston & Albany Railroad Company has a right to bring this action.

Let us now very briefly speak of the contract itself. You will notice as you read it that the first obligation assumed by the Boston & Albany Railroad Company is to license and permit the defendant to make certain uses of its tracks but this executed document, I instruct you gentlemen, means more than a mere license. By its terms the Boston & Albany Railroad Company assumed certain definite affirmative obligations to the Central New England Railway Company. For example, it undertakes to perform certain switching transfer operations for which in addition to the $15,000 mentioned it is to receive the special compensation fixed by the contract. Also in consideration of the sum of $15,000 and for no special compensation it agrees to sell tickets for the Central New England Railway Company; it agrees to handle baggage for the Central New England Railway Company; it agrees to take care of the defendant's passenger trains in the passenger yards of the Boston & Albany Company; it agrees to transfer through passenger cars to connecting lines, all of which are obligations that rest upon the Boston & Albany Railroad Company by force of the contract; therefore I have held and I instruct you now that the document is not a mere license revocable at the pleasure of either party and might not be revoked except as provided by the terms of the contract by a possible re- [fol. 30] vocation of the Boston & Albany Railroad Company but it is a contract that binds both parties to its terms and that it cannot be repudiated by either without answering in damages to the other. In connection with that I grant you the following requests for instructions.

As a matter of law the traffic agreement of October 25, 1899, the subject matter of this action, was not a revocable license terminable at the will of the defendant.

As a matter of law, the defendant had no right to repudiate on December 15, 1921, the traffic agreement of October 25, 1899, the subject matter of this action and thereby escape further liability to the plaintiff thereunder.

You may have inferred from some of the language used in the course of the trial that the New York Central Railroad Company and the New York, New Haven & Hartford

Railroad Company in their relations with the carrying out of this contract were acting by what I would describe as certain selfish motives. Such motives are immaterial, Mr. Foreman and gentlemen of the jury, and you need not be influenced by them in arriving at your conclusion concerning the issue here and that is true whether you consider the reasons for making the contract or the conduct, if any, of either of those railroads in reference to the carrying out or termination of the contract. In that connection I grant you the following request for instruction.

Any interest that the New York, New Haven & Hartford Railroad Company may have in the Central New England Railway Company is immaterial.

Thus it is, Mr. Foreman and gentlemen of the jury, that you are to determine certain issues here.

First: Was such contract made as that relied upon by the plaintiff in this case? That such a contract was in form [fol. 31] executed is not disputed but the burden of satisfying you by a fair preponderance of the evidence that such a contract was made rests upon the plaintiff and in that connection I give you these requests.

As a matter of law the failure of the defendant to deny the genuineness of the signatures to the written instrument declared upon constitutes an admission by it that the signatures are those of the parties whom the declaration alleges them to be.

As a matter of law the failure of the defendant to deny the genuineness of the signatures to the written instrument declared upon constitutes an admission as to the authority of the persons signing the same to act in behalf of the corporations for whom they purport to act.

Secondly. Was such contract repudiated by the defendant? In connection with that issue let me state to you, Mr. Foreman and gentlemen of the jury, that you are to attach no peculiar or odious significance to the word "repudiation." It is a legal term employed by the law itself to define an act by a party to a contract. An act may be of the most honest origin and for the most honorable motive but which act nevertheless constitutes an abandonment or repudiation of the contract, so you will understand when the word "repudiation" is used in these instructions it is

not intended to suggest any act of dishonesty. In this connection, was such contract repudiated? I grant you these requests for instructions—I grant these requests for instructions.

If the jury find that the defendant declined further to perform the traffic agreement of October 25, 1899, the subject matter of this action, from and after December 15, [fol. 32] 1921, and that the plaintiff was ready, and able and willing to perform the same the plaintiff is entitled to recover.

If the jury find that the defendant declined and refused further to perform the traffic agreement of October 25, 1899, the subject matter of this action, from and after December 15, 1921, and that it notified the plaintiff on or about November 9, 1921, that it would no longer operate its trains or otherwise avail itself of or perform the terms thereof or make the payments called for thereby after December 15, 1921, and did not in fact operate its trains in accordance with such notice and did not in fact thereafter make payments in accordance with this notice and that the plaintiff was ready, willing and able to perform its part of said agreement the plaintiff is entitled to recover.

The jury upon all the evidence will be warranted in finding the action of the defendant constituted in effect a repudiation of the tariff agreement of October 25, 1899, the subject matter of this action, and the plaintiff thereupon became entitled to recover the then value of all sums accruing thereunder until the expiration thereof on August 30, 1940, less whatever benefits, if any, have in the past or may in the future until August 30, 1940, accrue to it by reason of the defendants' failure or neglect to avail itself of the provisions thereof.

As a matter of law, the fact, if the jury find it to be a fact, that there was a severance of the physical connection between the rails of the Boston & Albany Railroad as operated by the plaintiff and those of the defendant at Agawam Junction subsequent to December 15, 1921, does not constitute a defense to this action.

And in that connection, Mr. Foreman and gentlemen of the jury, you have before you the letter written by the [fol. 33] Central New England Railway Company in November of 1921 to the Boston & Albany Railroad Company,

you will read the language of that letter, you will consider the correspondence following between the parties, you will consider what actually occurred thereafter; did the Central New England abandon the use of those tracks, of the Boston & Albany tracks, did the Central New England refuse to pay more money, and on those facts you will determine whether or not the Central New England Railway Company did, as alleged in the plaintiff's declaration, repudiate this contract.

Now, much has been said in the course of the trial as to the certificate of public convenience and necessity issued to the Central New England Railway Company by the Interstate Commerce Commission authorizing the company's abandonment of such of its track as ended at Agawam Junction. In that connection I instruct you as follows:

As a matter of law, the fact that on or about September 8, 1921, the Interstate Commerce Commission issued the certificate of public convenience and necessity to the defendant, a copy of which is set out in the defendant's answer, and that in pursuance of and in reliance on said certificate the defendant abandoned its line of railroad extending from Feeding Hills in the Town of Agawam to its connection with the Boston & Albany Railroad and ceased the operation of trains over this line into the city of Springfield by way of the plaintiff's tracks does not constitute a defense to this action.

If the defendant questions the authority of its president or its vice president to terminate or repudiate the tariff agreement of October 25, 1899, the jury may consider in that connection the fact, if they find it to be a fact, that the defendant has admittedly not operated its trains under the terms of said agreement nor made any payments therein [fol. 34] called for since the date fixed by its president and vice-president for the termination or repudiation of said agreement, to wit: December 15, 1921, as bearing upon the question of whether the defendant has adopted and ratified the acts of its said officers or either of them.

Upon all the evidence the jury would be warranted in finding that the conduct of the defendant amounted to a complete repudiation on December 15, 1921, of the contract upon which this action is brought, and entitled the plaintiff

to recover in this action the full damages which it sustained by such repudiation.

If the jury find that the defendant on December 15, 1921, repudiated the contract upon which this action is brought, the plaintiff was under no obligation thereafter to further perform its obligation under said contract, nor at all times thereafter to keep itself in a position to do so.

On the other hand unless the jury find that the defendant has entirely repudiated the agreement of 1899 the damages of the plaintiff are limited to the quarterly installment due on April 1, 1922.

And your next question will be this, if you find that the contract was repudiated, or let me say before I pass to that phase of these instructions. In order to make clear to you the present standing in this case of the so-called certificate of public necessity and convenience issued by the Interstate Commission—undoubtedly it raises a very interesting question of law as to the rights of the Central New England Railway Company thereunder in and to any contract that it might have then had pending with relation to the road, the part of the road abandoned—it has become the duty of this Court presiding at this trial to rule as a matter of law that the certificate issued by the Interstate Commerce Commission could not affect the contractual rights of the plaintiff in this case, that those rights supervened any action [fol. 35] of the Interstate Commerce Commission, it had a right to attempt to enforce them in an action like this. If I err as has been suggested here the Supreme Judicial Court of the Commonwealth will say so, if they do not say so why as to this question the Supreme Court of the United States may say so. It is your function, however, Mr. Foreman and gentlemen of the jury, for the purpose of this particular trial to accept your law as the trial judge gives it to you, so you will be guided by the opinion of the Court upon this somewhat important issue and the instruction of the Court is, so far as this question of liability is concerned, you dismiss from your minds all consideration of the certificate of the Interstate Commerce Commission.

* * * * * * *

Mr. Hall: I wish to except to your Honor's statement that they could dismiss from their minds all consideration

on the question of liability of the certificate of the Interstate Commerce Commission.

* * * * * * *

Wherefore the defendant being aggrieved by the foregoing rulings as made and the failure and refusals to rule, files this, its Substitute Bill of Exceptions, and prays that it be allowed.

By Its Attorneys, Choate, Hall & Stewart.

Order Setting Substitute Bill of Exceptions

January 25, 1928—Allowed as a substitute bill in lieu of the original bill duly filed.

Christopher T. Callahan, J. S. C.

[fol. 35a] Plaintiff's Declaration—Filed May 1, 1922

The plaintiff says that the defendant on or about October 25, 1899, entered into a contract in writing with the Boston & Albany Railroad Company, a copy of which is hereto attached and marked "A"; that said contract was to continue in effect until August 30, 1940; that under said contract the defendant was obligated to pay Fifteen Thousand Dollars ($15,000.00) per annum for the use of a portion of the Boston & Albany Railroad between Agawam Junction and Springfield, Massachusetts; that the plaintiff succeeded to all the rights of the Boston & Albany Railroad Company in said contract as the lessee of the Boston & Albany Railroad by virtue of a lease dated November 15, 1899; that the plaintiff and its predecessor, the Boston & Albany Railroad Company, have at all times been ready and willing to perform and have offered to perform the said contract and have performed said contract, except in so far as they have been prevented from doing by the acts of the defendant; that the defendant under date of November 9, 1921, notified the plaintiff that on December 15, 1921, it would cease to operate its trains over the Boston & Albany Railroad under said contract and would refuse to make any

further payments under said contract; that the defendant thereafter refused to pay to the plaintiff the bills due under said contract or to perform said contract after said December 15, 1921; all to the great damage of the plaintiff.

By Its Attorney, Geo. F. Fernald, Jr.

("A" printed on page 47.)

DEFENDANT'S DEMURRER—Filed May 22, 1922

Now comes the defendant in the above entitled action [fol. 36] and demurs to the plaintiff's declaration for the reason that the matters contained therein are insufficient in law to enable the plaintiff to maintain his action.

By Its Attorneys, Choate, Hall & Stewart.

I, Herbert Schnare, of counsel for the defendant, hereby certify that I am of the opinion that there is sufficient ground in law for the foregoing demurrer as to make it fit subject for judicial inquiry, and that the same is not intended for delay.

Herbert Schnare.

WAIVER OF DEMURRER—Filed Aug. 31, 1922

Now comes the defendant in the above entitled action and waives its demurrer heretofore filed, it being agreed that such waiver shall be without prejudice to the defendant's rights to raise in the later course of the proceedings the questions presented by the demurrer.

Choate, Hall & Stewart, Attorneys for Defendant.

Assented to by Geo. L. Mayberry, Attorney for Plaintiff.

DEFENDANT'S SUBSTITUTE ANSWER—Filed Sept. 1, 1926

Now comes the defendant in the above entitled action and without waiving the demurrer heretofore filed by it but expressly relying thereon, for answer to the plaintiff's declaration denies each and every allegation in the defendant's writ and declaration contained.

[fol. 37] And for further answer to the plaintiff's declaration the defendant says that the alleged contract attached to the plaintiff's declaration as Exhibit "A" was signed in pursuance of a previous agreement dated May 9, 1898, between the Boston & Albany Railroad Company, the Hartford & Connecticut Western Railroad Company, and the Philadelphia, Reading and New England Railroad Company and is Reorganization Committee, by the terms of which the defendant, Central New England Railway Company, was to be organized to enter into said Exhibit "A"; that, after the making of the contract alleged in the plaintiff's declaration both by the action of the plaintiff and the Boston & Albany Railroad Company jointly and severally, and also because of other circumstances not within the possible contemplation of the parties hereto at the time of the making of said agreement, the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant was rendered illegal, impossible, and such a hardship and heavy burden on the defendant as to be unenforcible, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

And for further answer to the plaintiff's declaration the defendant says that on September 8, 1921, in accordance with paragraphs 18 and 19 of Section 1 of the Interstate Commerce Act (41 U. S. Statutes at Large 474) a certificate of public convenience and necessity was issued to the defendant by the Interstate Commerce Commission, a copy of which is marked "Exhibit B" and annexed hereto and made a part of this answer; that in pursuance of and in reliance on this certificate the defendant abandoned its line of railroad extending from Feeding Hills in the Town of Agawam, County of Hampden, Massachusetts, to its con-[fol. 38] nection with the Boston & Albany Railroad, and ceased the operation of trains over this line into the City of Springfield, Massachusetts, by way of the plaintiff's tracks as provided in Exhibit "A" of the plaintiff's declaration.

By Its Attorneys, Choate, Hall & Stewart.

Filed by consent and allowed Sept. 1, 1926.

(Exhibit "B" printed on page 44.)

PLAINTIFF'S MOTION FOR SPECIFICATIONS AND ORDER THEREON—Filed Jan. 8, 1927

Now comes the plaintiff in the above entitled action and says that it is entitled to have stated in the defendant's answer with substantial certainty the substantive facts necessary to constitute its defense to this action, and that said answer is insufficient in that it fails to state such facts as to enable the plaintiff to meet the defense in part at least.

Wherefore the plaintiff moves that the defendant be ordered by the Court to file specifications specifying as follows:

First. Under the second paragraph of the defendant's substitute answer by what action of the plaintiff and the Boston & Albany Railroad Company, jointly, was the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant, rendered illegal, impossible and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

Second. Under the second paragraph of the defendant's substitute answer, by what action of the plaintiff was the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and [fol. 39] the performance of said arrangement by the defendant rendered illegal, impossible and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

Third. Under the second paragraph of the defendant's substitute answer, by what action of the Boston & Albany Railroad Company was the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant rendered illegal, impossible and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

Fourth. Under the second paragraph of the defendant's substitute answer, what were the other circumstances not within the possible contemplation of the parties thereto at the time of the making of said agreement as the result of which the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant was rendered illegal, impossible and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

Fifth. Under the second paragraph of the defendant's substitute answer, in what way or by what means was the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company rendered illegal, impossible and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

[fol. 40] Sixth. Under the second paragraph of the defendant's substitute answer, in what way or by what means was the performance of said arrangement by the defendant rendered illegal, impossible and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts.

Seventh. Under the second paragraph of the defendant's substitute answer by reason, or as a result, of what action of the plaintiff and the Boston & Albany Railroad Company, jointly and severally, and because of what other circumstances not within the possible contemplation of the parties thereto at the time of the making of said agreement, was the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant rendered contrary to the Constitution of the Commonwealth of Massachusetts.

By its Attorney, Lowell A. Mayberry.

Order on Above Motion

Boston, Jan. 14, 1927.—Specifications ordered as to 1, 2, 3, 4, 5 and 6 on or before Jan. 22, 1927. Need not answer No. 7.

James F. McDermott, Asst. Clerk.

Defendant's Specifications—Filed Jan. 22, 1927

Now comes the defendant in the above entitled case and in answer to the plaintiff's specifications numbered 1 to 6 says:

1. The action of the plaintiff and the Boston & Albany Railroad Company jointly consisted of:

a. The execution of an agreement and supplemental agreement of November 15, 1899, leasing to the plaintiff for 99 years from July 1, 1900, the entire line and property of [fol. 41] the Boston & Albany Railroad Company.

b. The failure and refusal by the Boston & Albany Railroad Company as leased and operated by the plaintiff to route any through traffic for points in the territory to the southwest over the shorter and more direct line of the defendant.

c. The diverting of freight shipments and other business of shippers by the defendant to their own lines.

d. The refusal of the Boston & Albany Railroad as leased and operated by the plaintiff to allow, permit or join with the defendant in establishing through rates from and to Springfield and points east and the territory southwest of Campbell Hall.

e. The prevention of the development of through traffic for the Southwest and the destruction of what through traffic was developed by the defendant.

f. The severance of the physical connection between the rails of the Boston & Albany Railroad as operated by the plaintiff and those of the defendant at Agawam Junction.

2. The action of the plaintiff consisted of:

a. The execution of an agreement and supplemental agreement of November 15, 1899, leasing for 99 years from July 1, 1900, the entire line and property of the Boston & Albany Railroad Company.

b. The operation and control of the said Boston & Albany Railroad Company in such way that:

I. It failed and refused to route any through traffic for points in the territory to the southwest over the shorter and more direct line of the defendant and also failed and refused to allow, permit or join with the defendant in establishing through rates from and to Springfield and points [fol. 42] each and points southwest of Campbell Hall.

II. Freight shipments and other business of shippers by the defendant were diverted to its own line and those of the plaintiff.

III. The development of through traffic for the southwest was prevented and what through traffic was developed by the defendant was destroyed.

IV. The physical connection between its rails and those of the defendant at Agawam Junction was severed.

3. The action of the Boston & Albany Railroad Company consisted of:

a. The execution of an agreement and supplemental agreement of November 15, 1889, providing for a lease of its entire line and property to the plaintiff for 99 years from July 1, 1900.

b. The failure and refusal to route any through traffic for points in the territory to the southwest over the shorter and more direct line of the defendant and also the failure and refusal to allow, permit or join with the defendant in establishing through rates from and to Springfield and points east and points southwest of Campbell Hall.

c. Freight shipments and other business of shippers by the defendant were diverted to its own line and those of the plaintiff.

d. The prevention of the development of through traffic for the southwest over the more direct line of the defendant and the destruction of what through traffic was developed by the defendant.

e. The severance of the physical connection between the lines of itself and the defendant at Agawam Junction.

4. a. The passage of the "Transportation Act" of February 28, 1920, 41 U. S. Statutes at Large 454, amending the [fol. 43] Interstate Commerce Act of February 4, 1887, as amended.

b. The lease of the Boston & Albany Railroad Company to the plaintiff and the failure and destruction of any through traffic from and to Springfield and points east and the territory to the southwest.

5. In the way and by the means set forth in specifications number one, two and three.

6. In the way and by the means set forth in specifications number one, two and three.

By Its Attorneys, Choate, Hall & Stewart.

Motion to Dismiss (as Amended)—Filed Feb. 8, 1927

Now comes the defendant in the above entitled action and moves that this cause be dismissed on one or all of the following grounds, the defendant moving that this motion be in amendment of the motion to dismiss heretofore filed.

(1) Because the "Transportation Act of February 28, 1920," 41 Statutes at Large 474, which amended the Interstate Commerce Act of February 4, 1887, as amended, gave to the Interstate Commerce Commission the exclusive jurisdiction of the subject matter involved in this case.

(2) Because the Interstate Commerce Commission in pursuance of the Interstate Commerce Act of February 4, 1887, as amended by the Acts of June 29, 1906, April 13, 1908, June 13, 1910, February 17, 1917, March 2, 1917, May 29, 1917, August 10, 1917 and February 28, 1920, has acted on the subject matter involved in this suit and issued its

order thereon, a copy of which is hereto annexed and marked Exhibit "A" and made a part of this motion.

[fol. 44] (3) Because the Interstate Commerce Act of February 4, 1887, as amended by the Acts of June 29, 1906, April 13, 1908, June 13, 1910, February 17, 1917, March 2, 1917, May 29, 1917, August 10, 1917, and February 28, 1920, has given to the Interstate Commerce Commission such jurisdiction of the subject matter of this case as to exclude this Court from any jurisdiction thereof.

(4) Because the Interstate Commerce Act of February 4, 1887, as amended by the Acts of June 29, 1906, April 13, 1908, June 13, 1910, February 17, 1917, March 2, 1917, May 20, 1917, August 10, 1917, and February 28, 1920, and Sections 207 and 208 of the Judicial Code, being Act of March 3, 1911, 36 U. S. Statutes at Large 1148, and Act of October 22, 1913, 38 U. S. Statutes at Large 219, have given to the Federal Courts exclusive jurisdiction of the subject matter of this case in such way as to exclude this Court from any jurisdiction thereof.

By Its Attorneys, Choate, Hall & Stewart.

Filed Feb. 8, 1927, and denied.

1927, Feb. 21.—Motion renewed—again denied. (Callahan J.)

Exhibit A to Motion to Dismiss

(Referred to as Exhibit "B" in Defendant's Answer)

Interstate Commerce Commission

Finance Docket No. 1479

In the Matter of the Application of The Central New England Railway Company for a Certificate of Public Convenience and Necessity

Submitted September 3, 1921. Decided September 8, 1921

Certificate Issued Authorizing the Abandonment of a Line of Railroad in Hampden County, Mass.

F. G. Buckland for applicant.

[fol. 45] Report of the Commission

Division 4, Commissioners Daniels and Potter

By Division 4:

The Central New England Railway Company, a carrier by railroad subject to the interstate commerce act, on June 15, 1921, filed an application for a certificate that the present and future public convenience and necessity permit the abandonment of a line of the applicant's railroad extending from the station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Hampden county, Mass., a distance of approximately 1.87 miles. No representations were made by the authorities of the State of Massachusetts either for or against the granting of the application. The case was submitted without formal hearing.

The applicant owns and operates about 300 miles of track in its entire system. Its trains enter Springfield, a city of more than 100,000 inhabitants, by using 4.05 miles of track of the Boston & Albany railroad. Under the trackage agreement the applicant is to pay the Boston & Albany Railroad Company $15,000 a year for the right to operate over this track not more than 3 freight trains of 30 cars each and 3 passenger trains daily. This agreement expires August 30, 1940.

The applicant proposes to abandon about 1.87 miles of track extending from Agawam to its connection with the Boston & Albany. The traffic is very light over this line; it is handled in one mixed train a day for the present time and it is not likely to increase in the near future. From Agawam an electic line runs directly into Springfield, haul- [fol. 46] ing passengers and light freight. For the year 1920 the revenue derived from the line proposed to be abandoned was $2,686.04, and the operating expenses were $41,518.62, resulting in an operating loss of $38,832.58.

Upon the facts presented we find that the present and future public convenience and necessity permit the abandonment of the line in question. A certificate to that effect will accordingly be issued.

Certificate

At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office, in Washington, D. C., on the 8th Day of September, A. D. 1921

Finance Docket No. 1479

In the Matter of the Application of The Central New England Railway Company for a Certificate of Public Convenience and Necessity

Investigation of the matters and things involved in this proceeding having been had, and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity permit the abandonment by the Central New England Railway Company of its line of railroad extending from the station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Massachusetts, as described in the application and report aforesaid;

It is ordered, That said Central New England Railway Company be, and it is hereby, authorized to abandon said line of railroad;

[fol. 47] It is further ordered, That said Central New England Railway Company, when filing schedules canceling tariffs applicable to said line of railroad, shall in such schedules make specific reference to this certificate by title, date and docket number.

By the Commission, Division 4:

George B. McGinty, Secretary. (Seal.)

(In ink:) A true copy. (S.) George B. McGinty, Secretary.

Exhibit 3

(Referred to as "A" in Plaintiff's Declaration)

This agreement made this 25th day of October, 1899, between The Boston & Albany Railroad Company, herein-

after called the Albany Company, of the first part, and the Central New England Railway Company, hereinafter called the New England Company, of the second part, witnesseth:

Whereas the New England Company, in pursuance of the agreement between the parties hereto and others dated the ninth day of May, 1898, is now constructing and will shortly complete the branch railroad from Tariffville, Connecticut, to a point at or near West Springfield, Massachusetts, to connect with the lines of the Albany Company:

Now, therefore, it is agreed as follows:

First. The Albany Company from and after the opening of the branch line for the passage of regular trains until the thirtieth day of August in the year nineteen hundred and forty, shall license and permit, subject to the regu- [fol. 48] lation and control of the Albany Company as to the movement and government of trains, the said Central New England Railway Company, and its successors to pass with trains and locomotives over the line of the Albany Company between the point of connection west of the Connecticut River and the yard and engine houses at West Springfield in each direction, and further for passenger trains across the bridge over the Connecticut River and into the Union Station at Springfield, with the right to use in connection with such trains all present and future water stations and other facilities necessary for the accommodation of such trains and the traffic to be transported by them, the said New England Company paying to the Albany Company therefor, fifteen thousand dollars ($15,000.00) per annum in equal quarterly payments on the first days of January, April, July and October of each year, the first payment to be made upon the first quarterly period next succeeding the opening of the said branch line for the passage of regular trains.

If the daily average number of trains shall exceed three freight trains of not more than thirty cars in each train in each direction, and three passenger trains in each direction the price to be paid shall be increased in the proportion in which the increased number of trains exceeds the number of trains aforesaid and this computation shall be made once in six months during the term of this contract and payment shall thereupon be made accordingly. If said New England Company shall take water from any of the

water stations of the Albany Company it shall share in the expense of maintaining such stations in proportion to the consumption of water by each of the parties thereto, including therein the price paid by the Albany Company for water. If the New England Company shall use the stalls in the engine house of the Albany Company it shall pay One Dollar ($1.00) per day for each stall so used. The said [fol. 49] New England Company shall be permitted to erect a coal platform or trestle for the loading of its supply coal at some convenient point to be mutually agreed upon.

Second. The Albany Company shall transfer or switch loaded freight cars brought by the New England Company to the West Springfield yard to a connection with the Boston and Maine Railroad Company's lines or the New York, New Haven and Hartford Railroad Company's lines in Springfield in either direction for the rate or sum of Two Dollars ($2.00) per car without regard to destination or contents of such car, and shall move such freight so brought by the New England Company designed for points in Springfield in carload lots, excepting coal for the rate or sum of thirty cents (30c) per ton of two thousand (2,000) pounds; the rate or sum for so moving coal shall be fifty cents (50) per ton of tweny-two hundred and forty (2,240) pounds.

The foregoing rates include the return of empty cars and the hauling of empty cars furnished by the New England Company to be loaded on the lines of any other company and then returned. For such freight as is required to pass through the freight house of the Albany Company the rate or sum to be charged shall be fifty (50) cents per ton of two thousand (2,000) pounds, and in addition thereto a charge for the labor of handling, based upon the proportion which the business of the New England Company bears to the total amount of the business passing through such freight house, to be computed monthly, and only to include the expense of labor in such freight house.

Third. The Albany Company for passenger business shall sell tickets, handle baggage, and take care of passenger trains in its passenger yard and transfer through passenger cars to connecting lines.

[fol. 50] Fourth. The New England Company shall build and maintain an interlocking tower and its connections at the point of junction of its road with the road of the Albany Company.

The necessary men for the operation of said tower shall be appointed and paid by the Albany Company and primarily deemed to be the servants of the Albany Company. Their compensation, however, shall be reimbursed to the Albany Company, by the New England Company, quarterly.

Fifth. The employees of the Albany Company while operating any signal or throwing any switch or performing any duty in connection with the operation of the rolling stock, shall be considered to be the servants of that one of said parties the moving of whose rolling stock called for such operation or performance, and in case of any accident arising from the acts, omissions or neglects of said employees, if such operation or performance is occasioned by the moving of the rolling stock of both parties, if it can be ascertained by whose rolling stock the injury is actually done, that party shall be responsible, but if that cannot be ascertained, then the responsibilty for that accident shall be borne by both parties equally. Each party shall be liable for any damage done through failure or defect of its equipment. The Albany Company shall be liable for any damage done through the failure or defect of its roadway, but in case of any interruption of business by any accident or disaster, the New England Company or its successors or transferee shall have only the same temporary opportunities for the use of the tracks of the Albany Company proportioned to its business as the Albany Company then has and enjoys for its own traffic. All responsibility for baggage brought to said Union Station by either Company and destined to a station on the road of the other Company shall be upon the forwarding Company after such baggage is un-[fol. 51] loaded at said Union Station, and all responsibility for baggage delivered at said station to be forwarded by the New England Company shall be upon the said New England Company from the time of its delivery, and all responsibility for baggage received at said station from said New England Company for delivery in Springfield shall be upon the New England Company from the time of such receipt until the same is delivered.

Sixth. The said Central New England Railway Company and its successors shall make the payments required by this contract in accordance with the terms thereof.

Seventh. No transfer of this contract or the rights under it, in whole or in part, shall be made by the said New England Company or its successors without the consent in writing of the Albany Company, and this contract is made upon this condition, that in case of a breach of any of the stipulations to be observed on the part of the New England Company or those claiming under it, and a continuance of such breach for thirty days or in case the rights under this contract shall be taken from said New England Compnay or its successors or transferree by process of law, by proceedings in bankruptcy or insolvency or for a receivership or otherwise, the Albany Company or its successors may, while the default or neglect continues, or at any time after such taking by process of law, and notwithstanding any license or waiver of any prior breach of condition, without any notice or demand terminate this contract and all rights acquired thereunder by the said New England Company or any person claiming by, through or under it.

In witness whereof, the parties hereto have hereunto set their respective corporate seals, duly attested, the day and year first aforesaid.

The Boston and Albany Railroad Company, by Edward D. Hayden, Vice-President. Attest: E. D. Hayden, Secretary & Clerk. (L. S.) Central New
[fol. 52] England Railway Company, by John W. Brock, President. Attest: Clyde A. Hillne. (L. S.)

At a meeting of the Directors of the Boston & Albany Railroad Company held in Boston July 27th, 1899, it was voted: That the Vice President is hereby authorized in behalf of this Company to execute and deliver an agreement between the Boston and Albany Railroad Company and the Central New England Railway Company in the terms set forth in an agreement made May 9th, 1898, between the Boston and Albany Railroad Company and the Philadelphia, Reading and New England Railroad Company, George O. Fletcher and others and the Hartford and Connecticut Western Railroad Company.

A true copy. Attest:

E. D. Hayden, Secretary & Clerk.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this 27th day of October 1899, personally appeared Edward D. Hayden to me known, and who, being duly sworn, says that he resides in the City of Woburn, County of Middlesex and Commonwealth of Massachusetts, and is the Vice President of the Boston and Albany Railroad Company described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was thereto affixed by order the Board of Directors of said Company and that he signed the same as Vice President of the Boston and Albany Railroad Company by virtue of like order of the said Board of Di-[fol. 53] rectors; and said Edward D. Hayden also acknowledged before me that the foregoing instrument is the free act and deed of the said Boston and Albany Railroad Company.

Frank H. Ratcliffe, Notary Public. (L. S.)

A stated meeting of the Board of Directors of Central New England Railway Company was held at the Company's office at 192 Broadway, New York City, on Wednesday, August 30th, 1899, at which the following resolution was adopted:

Resolved: That the officers of this Company be, and they hereby are, authorized and empowered to execute, acknowledge and deliver in the name and on behalf of this Company, an agreement with the Boston and Albany Railroad Company, embodying the terms and provisions of the agreement between said Company and others bearing date the ninth day of May, 1898, which has been ratified and adopted by this Company.

A true copy. Attest:
Clyde A. Hillne, Secretary. (L. S.)

STATE OF NEW YORK,
City and County of New York, ss:

On the 25th day of October, 1899, before me personally came John W. Brock, with whom I am personally acquainted, who having by me been duly sworn, said that he resides in Philadelphia, Penn., that at the time of the exe-

cution of the foregoing instrument he was President of the Central New England Railway Company; that the seal affixed to the foregoing instrument was such corporate seal; that it was affixed by order of the Board of Directors of said Central New England Railway Company, and that he signed his name thereto by like order as President of said Central New England Railway Company, and the said John W. Brock as such President of said Central New England Railway Company, also acknowledged before me that the foregoing instrument is the free act and deed of said Cen- [fols. 54 & 54a] tral New England Railway Company and of himself individually.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 25th day of October A. D. 1899.

John C. McGroarty, Notary Public, Kings County, N. Y. (L. S.)

Copy. Attest: —— ——, Clerk.

Note.—The exhibits referred to, made a part of and attached to the foregoing Bill of Exceptions are filed herewith.)

[fol. 55] Thence the case was continued, to await the decision of the Supreme Judicial Court of the Commonwealth, from time to time unto the fourteenth day of June, A. D. 1928, when on said day, the following rescripts were received and filed in our said Superior Court, to wit:

In Supreme Judicial Court of Massachusetts, at Boston, June 14, 1928

Rescript

In the case of

New York Central Railroad Company

vs

Central New England Railway Co.,

Pending in the Superior Court for the County of Suffolk

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

If within ten days after rescript in this case the plaintiff amends its writ by substituting the words "The Boston & Albany Railroad Company, Assignor for the benefit of The New York Central Railroad Company, Assignee," in place of the words "The New York Central Railroad Company," as the plaintiff therein, leave to make such amendment [fol. 56] being hereby granted, then the defendant's exceptions are overruled; otherwise, they are sustained.

Plaintiff's exceptions overruled.

By the Court:

June 14, 1928. Walter F. Frederick, Clerk.

Brief statement of the grounds and reasons of the decision: See opinion on file.

In Supreme Judicial Court of Massachusetts, at Boston, June 14, 1928

Rescript

In the case of

New York Central Railroad Company

vs

Central New England Railway Co.,

Pending in the Supreme Court for the County of Suffolk

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz:

If within ten days after rescript in this case the plaintiff amends its writ by substituting the words "The Boston & Albany Railroad Company, Assignor for the benefit of The New York Central Railroad Company, Assignee," in place [fol. 57] of the words "The New York Central Railroad Company," as the plaintiff therein, leave to make such amendment being hereby granted, then the defendant's exceptions are overruled; otherwise, they are sustained.

Plaintiff's exceptions overruled.

By the Court.

Walter F. Frederick, Clerk.

June 14, 1928.

Brief statement of the grounds and reasons of the decision: See opinion on file.

In Superior Court of Suffolk County

No. 140,676

New York Central Railroad Company

v

Central New England Railway Company

Plaintiff's Motion to Amend Writ—Filed June 15, 1928—and Order Allowing Same

Now comes the plaintiff in the above entitled action and after rescript from the Supreme Judicial Court moves to amend its writ by substituting the words, "The Boston [fol. 58] & Albany Railroad Company, Assignor for the benefit of The New York Central Railroad Company, Assignee," in place of the words "The New York Central Railroad Company" wherever they may appear.

By its Attorneys, George L. Mayberry, Lowell A. Mayberry.

And the Court endorses the following on said motion to amend writ, to wit: "Allowed. Christopher T. Callahan, J. S. C."

June 18, 1928.

In Superior Court of Suffolk County

[Title omitted]

Motion to Stay Entry of Judgment and Order Allowing Same—Filed June 29, 1928

Now comes the defendant in the above entitled case and says that on June 21 it forwarded to the Chief Justice of the Supreme Judicial Court a petition for reargument of [fol. 59] certain points and that it has been advised by the Chief Justice that such petition will be considered by the Full Court.

Wherefore the defendant prays that entry of judgment may be stayed until further order of the court.

By Its Attorneys, Choate, Hall & Stewart.

And the Court endorses the following on said Motion to Stay Entry of Judgment, to wit: "29 June 1928. It appearing that application for reargument is being considered by the Supreme Judicial Court this motion is allowed. Louis S. Cox, J. S. C." (Seal of the Superior Court of Suffolk County.)

Thence the case was continued unto the third day of July, A. D. 1928.

[fol. 60] In Superior Court of Suffolk County

[Title omitted]

Motion for Entry of Judgment and Order Thereon—Filed July 3, 1928

Now comes the plaintiff in the above entitled action and represents to this Honorable Court that since the allowance of the defendant's motion for stay of judgment, pending a decision by the Full Court upon its petition for reargument, a decision has been handed down by that Court denying said petition.

Wherefore the plaintiff prays that the order entered upon the defendant's motion staying the entry of judgment be revoked and that judgment be entered forthwith in accordance with the rescript handed down in this action.

By Its Attorney, Lowell A. Mayberry.

[fol. 61] And the Court endorses the following on said Motion for Entry of Judgment, to wit: "6 July, 1928. The order of 29 June, 1928, staying entry of judgment is hereby vacated. Louis S. Cox, J. S. C." (Seal of the Superior Court of Suffolk County.)

Judgment

Afterwards, to wit: on the thirtieth day of July, A. D. 1928 it is considered and ordered by the Court that judg-

ment be, and hereby is, entered for The Boston & Albany Railroad Company, Assignor for the benefit of the New York Central Railroad Company, assignee (as amended) Plaintiff as aforesaid, against Central New England Railway Company, Defendant as aforesaid, upon said verdict, for the sum of one hundred eighty-three thousand five hundred seventy-five dollars and ninety-one cents damages, and costs of suit taxed at eighty-one dollars and five cents. [fol. 62] All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, Walter Perley Hall, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this twenty-third day of October, in the year of our Lord one thousand nine hundred and twenty-eight.

Francis A. Campbell, Clerk. (Seal of Superior Court.)

[fol. 63] In Superior Court of Suffolk County

[Title omitted]

Plaintiffs.	Defendants.	Action of Contract.
Plaintiffs' Counsel.	Defendant's Counsel.	Ad damnum $500,000.
George H. Fernald	Choate, Hall	
Geo. L. Mayberry	& Stewart.	
Lowell A. Mayberry	F. A. Farnham	
Aug. 30, 1922.		J.

Trustees.	Trustees' Counsel.	Trial List.
1.	1.	Oct. Gen. 1922
2.	2.	Oct. Gen. 1923
3.	3.	Oct. Gen. 1924
4.	4.	Oct. Gen. 1925
		Oct. Gen. 1926

Date.	No.	
1922.		
May 1.		Entered. Declaration filed.
May 20.	1	Defendant's jury claim.
May 22.	2	Defendant's demurrer.
May 22.	3	Answer.
Aug. 31.	4	Defendant's waiver of demurrer.
[fol. 64]		
1924.		
Dec. 12.	5	Defendant's motion to amend answer and amendment.

Date.	No.	
Dec. 29. 1926.		Motion to amend answer allowed.
Sept. 1.	6	Defendant's motion for leave to substitute amended answer and allowed.
Sept. 1. 1927.	7	Defendant's substitute answer.
Jan. 8.	8	Plaintiff's motion for specifications.
Jan. 10.	9	Copy of notice to plaintiff to admit Execution of Documents under Rule 37.
Jan. 10.	10	Copy of notice to defendant to admit facts under Rule 37.
Jan. 10.	11	Copy of notice to defendant to admit execution of documents.
Jan. 12.	12	Copy of notice to plaintiff to admit facts under Rule 37.
Jan. 14.		Specifications ordered filed as to 1, 2, 3, 4, 5 and 6 on or before January 22, 1927. Need not answer 7.
Jan. 15.	13	Plaintiff's admission of execution of documents pursuant to notice under Rule 37.
Jan. 18.	14	Plaintiff's notice to admit execution of documents under rule 37 filed by leave as of Jan. 12, 1927.
Jan. 18.	15	Defendant's notice to admit execution of documents under rule 37 filed by leave.
Jan. 18.	16	Plaintiff's notice to admit execution of documents under rule 37 filed by leave, as of Jan. 12, 1927.
Jan. 18.	17	Plaintiff's admission of facts pursuant to notice under rule 37.
Jan. 18.	18	Plaintiff's admission of execution of documents pursuant to notice under Rule 37.
Jan. 20.	19	Defendant's refusal to admit facts pursuant to notice under rule 37.
Jan. 20.	20	Defendant's qualified admission of facts pursuant to notice under rule 37.
Jan. 20.	21	Defendant's admission of execution of document pursuant to notice under rule 37.
Jan. 21.	22	Defendant's admission of execution of document under rule 37.
Jan. 21.	23	Defendant's motion to dismiss.
Jan. 22. [fol. 65] 1927.	24	Defendant's specifications.
Feb. 8.		Defendant's motion to dismiss denied.
Feb. 8.	25	Defendant's amended motion to dismiss—denied.
Feb. 18.	26	Defendant's motion for directed verdict—denied.
Feb. 21.		Defendant's motion to dismiss renewed, again denied. (See paper No. 23).
Feb. 21.		Defendant's amended motion to dismiss renewed, again denied. (See paper No. 25).
Feb. 23.	27	Verdict for plaintiff for $169,012.72—(54h).
Mar. 2.	28	Time for filing plaintiff's exceptions extended to June 1, 1927 inclusive.
Mar. 2.	29	Time for filing defendant's exceptions extended to June 1, 1927 inclusive.
May 31.	30	Defendant's proposed exceptions.
June 1.	31	Time for filing plaintiff's exceptions extended to June 8, 1927 inclusive.
June 3.	32	Time for filing plaintiff's exceptions extended to August 1, 1927 inclusive.
July 27.	33	Time for filing plaintiff's exceptions extended to August 8, 1927 inclusive.
Aug. 5.	34	Plaintiff's proposed exceptions.
Sept. 1.		Notice to all attorneys and to Callahan, J., under Rule 53.
Sept. 20.	35	Time for allowance of defendant's exceptions extended to November 1, 1927, inclusive.

Date.	No.	
Oct. 10.	36	Time for allowance of defendant's exceptions extended to January 1, 1928, inclusive.
Oct. 11.	37	Time for allowance of plaintiff's exceptions extended to January 1, 1928, inclusive.
Dec. 22.	38	Time for allowance of plaintiff's exceptions extended to February 1, 1928 inclusive.
Dec. 22.	39	Time for allowance of defendant's exceptions extended to February 1, 1928 inclusive.
1928.		
Jan. 25.		Plaintiff's substitute Bill of Exceptions allowed.
Jan. 28.	40	Plaintiff's substitute Bill of Exceptions filed.
Jan. 25.		Defendant's substitute Bill of Exceptions allowed.
Jan. 28.	41	Defendant's substitute Bill of Exceptions filed.
1928.		
June 14.	42	Rescript from Supreme Judicial Court.—"If within ten days after Rescript in this case the plaintiff amends its writ by substituting the words 'The Boston & Albany
[fols. 66 & 67]		Railroad Company, Assignor for the benefit of the New York Central Railroad Company, Assignee,' in place of the words 'The New York Central Railroad Company' as the plaintiff therein, leave to make such amendment being hereby granted, then the defendant's exceptions are overruled; otherwise, they are sustained. Plaintiff's exceptions overruled."
June 14.	43	Rescript from Supreme Judicial Court. (Same as paper #42).
June 15.	44	Plaintiff's motion to amend writ and amendment and allowed June 18, 1928.
June 20.	45	Defendant's motion to stay entry of judgment and allowed. (See order).
July 3.	46	Plaintiff's motion for judgment.
July 6.		Plaintiff's motion (paper 46) "The order of June 29, 1928, staying entry of judgment is hereby vacated."
July 30.		Judgment for Plaintiff.
		Damages $183,575.91
		Costs $81.05

(October 23rd, A. D. 1928.)

Attest: Francis A. Campbell, Clerk. (Seal.)

[fol. 68] In Supreme Judicial Court of Massachusetts

Opinion

Pierce, J.:

In this action the plaintiff seeks to recover damages because of the breach of a written contract. The plaintiff's declaration consists of one count, in the terms which follow: "The plaintiff says that the defendant on or about October 25, 1899, entered into a contract in writing with the Boston & Albany Railroad Company, a copy of which is hereto at-

tached and marked 'A'; that said contract was to continue in effect until August 30, 1940; that under said contract the defendant was obligated to pay Fifteen Thousand Dollars ($15,000.00) per annum for the use of a portion of the Boston & Albany Railroad between Agawam Junction and Springfield, Massachusetts; that the plaintiff succeeded to all the rights of the Boston & Albany Railroad Company, in said contract as the lessee of the Boston & Albany Railroad by virtue of a lease dated November 15, 1899; that the plaintiff and its predecessor, the Boston & Albany Railroad Company, have at all times been ready and willing to perform and have offered to perform the said contract, and have performed said contract, except in so far as they have been prevented from so doing by the acts of the defendant; that the defendant under date of November 9, 1921, notified the plaintiff that on December 15, 1921, it would cease to operate its trains over the Boston & Albany Railroad under said contract and would refuse to make any further payments under said contract; that the defendant thereafter refused to pay to the plaintiff the bills due under said contract or to perform said contract after said December 15, 1921; all to the great damage of the plaintiff."

[fol. 69] The defendant's substitute answer denies each and every allegation in the plaintiff's "writ and declaration contained. And for further answer to the plaintiff's declaration the defendant says that the alleged contract attached to the plaintiff's declaration as Exhibit 'A' was signed in pursuance of a previous agreement dated May 9, 1898, between the Boston & Albany Railroad Company, the Hartford & Connecticut Western Railroad Company, and the Philadelphia, Reading and New England Railroad Company and its Reorganization Committee, by the terms of which the defendant, Central New England Railway Company, was to be organized to enter into said Exhibit 'A'; that, after the making of the contract alleged in the plaintiff's declaration both by the action of the plaintiff and the Boston & Albany Railroad Company; jointly and severally, and also because of other circumstances not within the possible contemplation of the parties thereto at the time of the making of said agreement, the operation of

trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant was rendered illegal, impossible, and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts. And for further answer to the plaintiff's declaration the defendant says that on September 8, 1921, in accordance with paragraphs 18 and 19 of Section 1 of the Interstate Commerce Act (41 U. S. Statutes at Large 474) a certificate of public convenience and necessity was issued to the defendant by the Interstate Commerce Commission, a copy of which is marked 'Exhibit B' and annexed hereto and made a part of this answer; that in pursuance of and in reliance on this certificate the defendant abandoned its line of railroad extending from Feeding Hills [fol. 70] in the Town of Agawam, County of Hampden, Massachusetts, to its connection with the Boston & Albany Railroad, and ceased the operation of trains over this line into the City of Springfield, Massachusetts, by way of the plaintiff's tracks as provided in Exhibit 'A' of the plaintiff's declaration."

After a trial and verdict for the plaintiff in the Superior Court, the case comes before this court on two substitute bills of exceptions, one of the plaintiff and the other of the defendant. The bill of exceptions for the plaintiff is addressed mainly to rulings of the presiding judge on the measure of damages and as to the burden of proof upon the issue of the amount of damages. The exceptions of the defendant relate (1) to the refusal of the presiding judge to grant its motions to dismiss the action, in substance because, as it is alleged, the Federal statutes have given to the Federal courts exclusive jurisdiction of the subject of this case; (2) to the refusal of the presiding judge to grant its motion for a directed verdict; (3) to the admissibility or rejection of testimony; and (4) to the granting of certain requested rulings of the plaintiff, and to the refusal to give certain requests for rulings made by the defendant.

The contract relied on by the plaintiff, in substance above set out, is contained in an instrument under seal, executed

by the Boston & Albany Railroad Company and the defendant. The plaintiff's right to bring this action rests on two assignments, (1) that of the Boston & Albany Railroad Company to the New York Central & Hudson River Railroad Company, dated November 15, 1899, and contained in a lease of the Boston & Albany Railroad Company to the New York Central & Hudson River Railroad Company, which was executed subject to the approval of the Legis- [fol. 71] lature, and approved, with certain stipulations, by St. 1900, c. 468; the stipulations were accepted September 19, 1900; Boston & Albany Railroad v. New York Central Railroad, 256 Mass. 600, 614; and (2) an assignment through the lease of the New York Central & Hudson River Railroad Company to the plaintiff, which was admitted without objection by the defendant. The plaintiff offered in evidence the agreement between the Boston & Albany Railroad Company and the defendant, dated October 25, 1899, upon which the plaintiff bases its right to recover in this action. The defendant did not file any denial of the genuineness of the signatures to this instrument, nor any notice that it would require proof of them at the trial; G. L. c. 231, § 29; Scholl v. Gillman, Mass. Adv. Shs. (1928) 897, 899; and in response to a request under G. L. c. 231, § 69, as amended by St. 1926, c. 381 § 1, it admitted the execution of the agreement, but not the authority of the persons whose signatures appear thereon to bind the corporation. The agreement was admitted in evidence subject to the exception of the defendant upon the question of authority, no other objection or exception being argued. Under Rule 37 of the Superior Court (1923) the defendant admitted "that payments covering operation under the agreement of October 25, 1899 from September 12, 1902 to December 15, 1921 were made by the Central New England Railway Company to the Boston & Albany Railroad Company (New York Central & Hudson River Railroad Company lessee) until sometime in 1914 and to the Boston & Albany Railroad Company (New York Central Railroad Company, lessee) from 1914 to 1921. Said payments were for the total amount and were all of the charges made by the Boston & Albany Railroad Co. (New York Central & Hudson River Railroad Company or New York Central Railroad Company, lessee, as the case might be) on account

[fol. 72] of operation under the agreement of October 25, 1899 from that date until December 15, 1921. The defendant has not operated under the agreement of October 25, 1899 nor made payments under the same since December 15, 1921."

In June, 1921, the defendant, under § 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920, 41 U. S. Sts. at Large, 474, "filed an application for a certificate that the present and future public convenience and necessity permit the abandonment of a line of the applicant's railroad extending from the station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Hampden county, Mass., distance of approximately 1.87 miles." On this application the report of the commission is in part as follows: The Central New England Railway Company "owns and operates about 300 miles of track in its entire system. Its trains enter Springfield, a city of more than 100,000 inhabitants, by using 4.05 miles of track of the Boston & Albany railroad. Under the trackage agreement the applicant is to pay the Boston & Albany railroad company $15,000 a year for the right to operate over this track not more than 3 freight trains of 30 cars each and 3 passenger trains daily. This agreement expires August 30, 1940. The applicant proposes to abandon about 1.87 miles of track extending from Agawam to is connection with the Boston & Albany. The traffic is very light over this line; it is handled in one mixed train a day for the present time and it is not likely to increase in the near future. From Agawam an electric line runs directly into Springfield, hauling passengers and light freight. For the year 1920 the revenue derived from the line proposed to be abandoned was $2,686.04, and the operating expenses were [fol. 73] $41,518.62, resulting in an operating loss of $38,832.58. Upon the facts presented we find that the present and future public convenience and necessity permit the abandonment of the line in question. A certificate to that effect will accordingly be issued."

On September 8, 1921, the commission issued a certificate of public convenience and necessity in the following form:

"Investigation of the matters and things involved in this proceeding have been had, and said Division having, on

the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof: It is hereby certified, That the present and future public convenience and necessity permit the abandonment by the Central New England Railway Company of its line of railroad extending from the station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Massachusetts, as described in the application and report aforesaid; It is ordered, That said Central New England Railway Company be, and it is hereby, authorized to abandon said line of railroad; It is further ordered, That said Central New England Railway Company, when filing schedules canceling tariffs applicable to said line of railroad, shall in such schedules make specific reference to this certificate by title, date and dockets number." On November 9, 1921, the defendant sent the Boston & Albany Railroad Company a letter, which reads: "Please take notice that this Company will discontinue operation of its lines north of Feeding Hills station, and between there and Agawam Junction, effective December 15, 1921. At said date this Company will cease to make use of the license and permission acquired by it by [fol. 74] virtue of contract with your Company of October 25, 1899, and will discontinue payments thereunder as of said date. The above discontinuance of operation is by virtue of certificates of the Interstate Commerce Commission, Division 4, dated September 8, 1921, in the matter of application of the Central New England Railway Company for a certificate of public convenience and necessity, Finance Docket #1479. If any questions of detail arise in connection with the discintinuance, they may be taken up and settled by mutual agreement between representatives of the two Companies."

It is not disputed that the branch line in question was open and that the defendant began the operation of its trains thereover on September 15, 1902, and continued such operation with gradual decrease in the number of trains operated until December 15, 1921, when, pursuant to a written notice dated November 9, 1921, the defendant ceased the operation of trains over the tracks of the plain-

tiff and declined to make any further payments under the contract; and it is also admitted that, since December 15, 1921, the defendant has never operated any trains over the tracks of the plaintiff into Springfield or West Springfield, nor has it made any payments in accordance with the terms of the agreement and has since failed to exercise its rights thereunder, pursuant to its letter of November 9, 1921. A lengthy correspondence between the plaintiff and defendant followed the letter of November 9, after which, on April 5, 1922, this action was brought to recover damages at the rate of $15,000 a year for more than eighteen years.

We shall consider the motion of the defendant to dismiss, in connection with its motion for a directed verdict. [fol. 75] The Interstate Commerce Act as amended by the Transportation Act of February, 1920, 41 U. S. Sts. at Large, 456, 477, 478, § 1, paragraphs 18-20, inclusive, upon which the defendant relies to sustain its motion to dismiss for want of jurisdiction, as also in support of its motion for a directed verdict, reads:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commissioner a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply

to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be [fol. 76] heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation may be enjoined by any court of competent jurisdiction operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes consents to or permits any violation of the provisions of this paragraph or of paragraph (18) of this section shall upon conviction thereof be punished by a fine of not more than $5000 or by imprisonment for not more than three years, or both."

[fol. 77] The matter of first importance, because it affects the jurisdiction of the court, is the contention that the cer-

tificate of public convenience and necessity issued to the defendant by the interstate commerce commission is a defence to this action. Congress in the exercise of its power to regulate interstate commerce may unquestionably in the interests of the public at large authorize the interstate commerce commission to permit an interstate carrier to abandon an existing obligation without thereby incurring a liability. Union Bridge Co. v. United States, 204 U. S. 364, 399, 400. Hadacheck v. Los Angeles, 239 U. S. 394. New York v. United States, 257 U. S. 591, 601. Dayton-Goose Creek Railway v. United States, 263 U. S. 456, 478. Commonwealth v. Alger, 7 Cush. 53, 85, 86. Donham v. Public Service Commissioners, 232 Mass. 309, 316, 317. Brett v. Building Commissioner of Brookline, 250 Mass. 73, 77. Compare Railroad Commission of Texas v. Eastern Texas Railroad, 264 U. S. 79, 85. The issues here are whether Congress conferred such authority on the interstate commerce commission and, if Congress did, whether the authority so conferred has been exercised. It is fundamental that the act of Congress and the order of the interstate commerce commission will not be construed to deprive the Boston & Albany Railroad Company or its successor, the New York Central Railroad Company, of its vested rights unless it appears by express words or plain implication that such was the intention of both Congress and the commission. Sewall v. Jones, 9 Pick. 412, 414. Commonwealth v. Tewksbury, 11 Met. 55, 57. Commonwealth v. Hayden, 211 Mass. 296, 297. Regina v. Guardians of Mallow Union, 12 I. C. L. 35, 41. Metropolitan Asylum District v. Hill, 6 App. Cas. 193, 208. Western [fol. 78] Counties Railway v. Windsor & Annapolis Railway, 7 App. Cas. 178, 188. See Texas v. Eastern Texas Railroad, 258 U. S. 204, 217, 218. This rule of construction, however, does not go to the extent of destroying the purpose underlying the legislation. It will be assumed that Congress, in enacting Interstate Commerce Act, § 1, paragraphs 18-20, as amended by 41 U. S. Sts. at Large, 456, 477, 478, authorized the commission to sanction the abandonment by an interstate carrier of a contractual obligation, such as existed between the parties in the case at bar, with impunity. Chief Justice Taft, in Dayton-Goose Creek Railway v. United States, supra, said that the Transportation Act

* * * seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged. * * * To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety."

Mr. Justice Brandeis, in Colorado v. United States, 271 U. S. 153, 162, said:

[fol. 79] "The certificate issues, not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intra-

state commerce at a large loss. The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which are found to result from operating a branch at a large loss."

See in this connection the Congressional Record of the 66th Congress, 2d Session, on pages 131, 825, 862 and 863.

The question remains whether the interstate commerce commission has exercised the authority which, it has been assumed, Congress has conferred on it. The solution rests [fol. 80] in a construction of the report and certificate of the commission. We are of opinion the certificate of the interstate commerce commission is not a defence to this action for the reason that it does not appear by express words or clear implication that the commission intended to deprive the Boston & Albany Railroad Company, or its successor, of its rights under the agreement with the Central New England Railway Company. This view of the intention of the interstate commerce commission finds support in the admitted fact that the application of the defendant was submitted to the commission "without formal hearing," and without the plaintiff being made a party to the proceedings. It is supported by the further fact that it is not to be supposed by implication that the interstate commerce commission intended to adjudicate without a hearing that the $15,000 annual payment was included in the operating charges of the defendant railroad.

The defendant sustained an operating loss on the sections of the lines now abandoned, for the year 1920, of $38,832.58, which the commission, apparently, desired to wipe out. The operating loss was ascertained by deducting the revenue, $2,686.04, from the operating expenses, $41,518.62. The annual rental for this section of the lines could have been found to be a fixed charge and not an operating expense. Schmidt v. Louisville, C. & L. Railway, 119 Ky. 287, 301, 305. In Reagan v. Farmers' Loan & Trust Co. 154 U. S. 362, in the financial statement on page 406 the rental for use of a bridge is not included in operating ex-

penses. Compare Adams v. Eastern Massachusetts Street Railway, 257 Mass. 115, 132, Galveston Electric Co. v. Galveston, 258 U. S. 388, 399, Nampa & Meridian Irr. Dist. v. Bond, 288 Fed. Rep. 541, 543, Fleischer v. Pelton Steel Co. 183 Wis. 451, 458, 459.

The end sought by the commission in issuing the certifi- [fol. 81] cate, the wiping out of the operating loss, does not involve the removal of the fixed charge for rental. In addition both parties to the agreement are interstate carriers. It is natural to assume that if the commission had intended to take away an asset from one carrier for the purpose of relieving another carrier of liability, it would have required further facts and dealt with this question specifically. See in this connection Control of Hereford Railway, 99 I. C. C. 7.

The defendant contends that its motion to dismiss for want of jurisdiction should have been allowed. This case, however, is not brought to enjoin, set aside, annul, or suspend in whole or in part the order of the Interstate Commerce Commission in view of the construction of this order adopted. The contention that the court did not have jurisdiction to construe the order is groundless. Great Northern Railway v. Merchants Elevator Co., 259 U. S. 285, and cases collected in note, page 295, and references therein to Cheney v. Boston & Maine Railroad, 227 Mass. 336, as contra.

Under the terms of the contract the defendant agreed to pay $15,000 per annum in return for the plaintiff's promise to "license and permit * * * [it] to pass with trains * * * over the line of the [plaintiff's lessor]." The agreement is free from ambiguity and indicates beyond a doubt that the annual payment was to be made irrespective of use. It was consideration paid for the right to use and not for the use, and as so construed it does not involve a forfeiture. If it be assumed that the agreement is in the nature of a license rather than an easement in gross, Goldman v. Beach Front Realty Co. 83 N. J. L. 97, 99, 100, or a trackage contract for a stated period, Union Pacific Railway v. Chicago, Rock Island & Pacific Railway, 163 U. S. [fol. 82] 564, and has the usual characteristic of a license, namely, revocability, it does not follow that the license can be revoked by either party with impunity.

We think the Central New England Railway Company under the terms of the agreement can be held liable for

breach of contract. Williston, Contracts, vol. 1, § 493. McCrea v. Marsh, 12 Gray, 211. King v. David Allen & Sons, Billposting, Ltd. [1916] 2 A. C. 54. Kerrison v. Smith [1897] 2 Q. B. 445. United Merchants' Realth & Improvement Co. v. American Billposting Co. 128 N. Y. Supp. 666, 667. The promise of the Boston & Albany Railroad Company was not, therefore, purely illusory. The case of Whittemore v. New York, New Haven & Hartford Railroad, 191 Mass. 392, is clearly distinguishable; there the term of the agreement, "that whenever said first party may find it necesary for the accommodation of its business to remove said spur track," no claim for damages shall be made, was the decisive factor. The lease by the Boston & Albany Railroad Company to the New York Central Railroad Company did not revoke the license. Under the terms of the lease of the defendant and the Boston & Albany Railroad Company the former assumed all the obligations of the latter. It is clear, therefore, that the Boston & Albany Railroad Company did not intend to revoke the license by the assignment. It is not open to serious doubt that under the terms of the agreement betwen the Boston & Albany Railroad Company and the Central New England Railway Company, the duties of the former could be delegated. The seventh paragraph of the agreement provides in part that "in case of a breach of any of the stipulations to be observed on the part of the New England Company or of those claiming under it, and a continuance of such breach for thirty (30) days, or in case the rights under this contract shall be taken from said New England Company or [fol. 83] its successor or transferee * * * the Albany Company or its successors may, while the default or neglect continues, * * * without any notice or demand, terminate this contract * * *" See in this connection Williston, Contracts, vol. 1, §423. The defendant admittedly paid a sum of money annually over a period of nineteen years to the plaintiff or to its predecessor, the New York Central & Hudson River Railroad Company. See Boston & Albany Railroad v. New York Central Railroad, 256 Mass. 600, 609. Such action on its part prevents it from now objecting to the assignment. Nelson Threatre Co. v. Nelson, 216 Mass. 30, 34. Saxeney v. Panis, 239 Mass. 207, 210.

The exceptions taken to the refusal to grant the motion to dismiss and to direct a verdict for the defendant, in so far as they are based upon its requests numbered two, and nineteen, which read: (2) "The duties imposed upon the Boston & Albany Railroad Company by the agreement sued on were such as could not be delegated to the New York Central Railroad Company so that the defendant is relieved from liability on its undertakings"; (19) "the lease of the Boston & Albany Railroad Company to the New York Central and Hudson River Railroad Company dated November 15, 1899, effective July 1, 1900, is a revocation and termination of the license and privileges granted by the agreement of October 25, 1899"; and to the granting of the request of the plaintiff numbered ten, which reads: "As matter of law, the execution of the agreement and supplemental agreement of November 15, 1899, leasing to the New York Central & Hudson River Railway Company for a period of ninety-nine (99) years from July 1, 1900, the railroad system and equipment of the Boston & Albany Railroad Company does not constitute a defense to this action" must be overruled. In so far as these exceptions are based [fol. 84] upon the defendant's request numbered four which reads: "There is no evidence in this case that would warrant the jury in finding that the defendant is bound by any obligation existing under any agreement between it and the New York Central Railroad Company"; and to the granting of request of the plaintiff numbered seventeen, which reads: "As matter of law, the plaintiff as lessee or assignee of the lessee of the Boston & Albany Railroad Company has a right to bring this action," they must be sustained. "A third person cannot maintain an action on a sealed instrument to which he is not a party." Cavanaugh Bros. Horse Co. v. Gaston, 255 Mass., 587, 590.

The defendant's exception to the exclusion of the offer of proof, in which circumstances surrounding the execution of the lease are set forth tending to prove, it is contended, that the defendant was not under a liability to pay irrespective of use, must be overruled. Under the law of this Commonwealth such evidence is inadmissible when the agreement is unambiguous in its terms. Snider v. Deban, 249 Mass. 59, 61.

The defendant asked a witness on cross-examination the following question: "Did the New York Central Railroad Company by its own or leased or controlled lines during the period from 1902 to 1921 have its own routes and access to territory to the southwest of Maybrook and Campbell Hall, and did the New York Central own or control lines as part of its system in the territory southwest of Campbell Hall, particularly of such centers as Scranton, Wilkesbarre, Williamsport, and Pittsburgh, Pennsylvania?" The defendant saved an exception to the exclusion of this question and then offered to prove by the same witness that "the plaintiff, * * * by its own and leased or controlled lines had its own routes and access to the territory to the [fol. 85] southwest of Maybrook and Campbell Hall, and that the lines owned and controlled by the plaintiff as a part of its railroad system extended to the same strategic points in the territory to the southwest of Campbell Hall as did the lines of the carriers with which the defendant connected at Maybrook and Campbell Hall; that the route of the defendant and the lines with which it connected at Campbell Hall and Maybrook was the shorter and more direct route from Springfield, Massachusetts, to the coal territory in a generally southwesterly direction and particularly to such centers as Scranton, Wilkesbarre, Williamsport, Clearfield, and Pittsburgh, Pennsylvania; and that after the lease by the plaintiff of the Boston & Albany Railroad, which up to that time had been an independent carrier with no particular western or southwestern affiliations, any traffic from Springfield and points east destined for the territory to the southwest of Campbell Hall would, in the ordinary course of events, be and was taken by the plaintiff and routed over its own line, even though the defendant's route was more direct; thus depriving the defendant of the through traffic which the plaintiff knew, and which was contemplated by the parties to the original agreement of 1898 and 1899, to be the only possible means of operation on its Springfield branch without loss." The trial judge rejected this offer of proof and an exception was duly saved.

The defendant offered its certificate of incorporation to show the men who were its organizers and the fact that they

knew and fully understood that it was possible to operate without loss, to Springfield, Massachusetts, only by through traffic from and to Springfield and points east, to and from the territory southwest of Maybrook and Campbell Hall, [fol. 86] and that such through traffic was the means of performance contemplated and relied on by them in executing the agreement of October 25, 1899. This offer was rejected and the defendant's exception duly saved.

The defendant made the following offers of proof: "* * * in 1898 and thereafter the plaintiff and the Boston & Albany Railroad Company knew that local traffic from and to other stations on the Central New England Railway Company and Springfield and points east thereof could not possibly be sufficient to permit the operation of the branch line, constructed in pursuance to the agreement and reorganization of 1898, without tremendous loss, and that the only means of operating said line without loss was by obtaining through traffic from and to points in the territory to the southwest of Campbell Hall and Maybrook and Springfield and points east thereof; * * * that the persons who organized and/or controlled the defendant corporation in 1898 at the time of reorganization and arrangement which resulted in the agreement sued on were influential in and thoroughly familiar with the operations of and the control of the Boston & Albany Railroad Company, and particularly closely associated with the men in charge of * * * [that company]; that the parties to the agreements of May 9, 1898, and October 25, 1899, fully understood that the branch line of the defendant could not be operated nor the agreement performed unless through traffic over the defendant's route from and to Springfield and points east to and from the territory to the southwest of Maybrook and Campbell Hall was developed; that such through traffic was the means of performance contemplated and relied on by the parties to this original arrangement of 1898 and the destruction and failure of such through traf-
[fol. 87] fic has taken from operation by the defendant under the agreement the expected value of performance and destroyed the only possible and the contemplated means of operation and performance without loss; * * * that the plaintiff, with knowledge * * * [of] the only possible means of operation under and performance of the agree-

ments of May 9, 1898, or October 25, 1899, * * * after it had leased the Boston & Albany Railroad, refused to allow, permit or join with the defendant in establishing such through rates and affirmatively took steps to obtain and keep for itself all traffic to and from Springfield and points east and points to the west, southwest or south; * * * that the men who organized and/or controlled the defendant corporation in 1898 and at the time of the organization and arrangement which resulted in the agreement sued on included a director of the Boston & Albany Railroad Company, who was also a brother-in-law of the then president and a son of the former president of the Boston & Albany Railroad Company; and that the men who owned a voting control of the defendant at the time of its organization and for a time thereafter were a son of a former president of the Boston & Albany Railroad and a blood relation of his, the former of said men being also a brother-in-law of the then president and the then vice-president of the Boston & Albany Railroad Company, both of which gentlemen were sons-in-law of a former president of the Boston & Albany Railroad Company."

The defendant also offered to show "that at Maybrook and Campbell Hall, New York, it had connections with numerous through carriers serving directly the territory to the west, southwest and south, in particular, the Pennsylvania Railroad System, the Baltimore & Ohio, the Erie, the Delaware, Lackawanna & Western, the Lehigh & New England and the Lehigh & Hudson Railroad." The defendant excepted to the exclusion of this offer of proof. [fol. 88] The admissibility of it as indicating the circumstances under which the agreement was made has been previously discussed.

The defendant argues that all its exceptions to the offers of proof should be sustained. The offers of proof were properly excluded. The defendant, in substance, is seeking to have read into the agreement stipulations on the part of the Boston & Albany Railroad Company not to compete, and to undertake to divert traffic to the defendant's lines. The principle, that if one party to a contract hinders performance by the other party performance by the latter is excused, does not warrant placing such an interpretation upon the contract the parties have chosen to make. More-

over, the fact that the defendant became a party to the agreement relying upon certain traffic to prevent it from operating at a loss, a fact that was within the knowledge of the other party, will not excuse performance by the defendant if such traffic is not obtained. John Soley & Sons, Inc. v. Jones, 208 Mass. 561. Morse v. Boston, 260 Mass. 255, and cases cited.

It is contended that the certificate of the interstate commerce commission was admissible upon the question of repudiation of the agreement; that the certificate is set forth as the reason for the discontinuance of the operation of the road in two of the four letters on the basis of which the jury were instructed that they could find that the agreement was repudiated. The certificate is not material upon the question of repudiation because it does not justify the repudiation. The fact that the defendant believed it was justified in acting as it did is of no legal consequence.

The defendant argues that the correspondence between the president of the Central New England Railway and the [fol. 89] vice-president of the Boston & Albany Railroad was improperly admitted. Objections were made and exceptions saved to the admissibility of some of these letters at the time of their introduction, and subsequent to the introduction, of all the letters a motion was made to strike out all the correspondence after the letter of November 9, 1921, to the denial of which an exception was saved. The judge at the time of the denial of this motion instructed the jury that "the letters have been admitted solely upon the question whether the defendant Railroad Company abandoned the contract that it had with the plaintiff Railroad Company, and for no other purpose. If it be assumed that the letters were written for settlement purposes, they were admissable, nevertheless to establish an abandonment of the agreement, within the principle that evidence of an admission by a party of a fact which is not itself being discussed by the parties in connection with the proposed settlement is competent although made in the course of the settlement proceedings. Dickinson v. Dickinson, 9 Met. 471, 474. Durgin v. Somers, 117 Mass. 55, 61. Wigmore on Evidence (2d ed.) §1061. The case is not similar in this respect to Garber v. Levine, 250 Mass. 485, 489, 490. In the circumstances here disclosed we do not think the defendant was harmed by

the allowance of the single letter, dated January 3, 1922, which bore the legend "without prejudice."

The defendant offered in evidence figures showing the cost of the maintenance of way, superintendence, dispatching trains, signal and interlocker operation, crossing protection and telephone and telegraph operation for each year from 1921 up to and including 1925 on the entire system of the Boston & Albany Railroad Company; and also, figures showing the total mileage of both freight and passenger trains and cars operated upon the entire system during the [fol. 90] same period. Under the agreement the defendant had the right to use all present and future water stations and other facilities necessary for the accommodation of trains and the traffic to be transported by them over the leased lines. The Boston & Albany Railroad was required in connection with the passenger business of the defendant to sell tickets, handle baggage, and take care of passenger trains in its passenger yard and transfer through passenger cars to connecting lines; and it was to receive compensation for the transferring and switching of freight cars. The defendant desired to show the plaintiff's gain from the cessation of operation of the defendant's trains by dividing the total cost by the total mileage, as shown by the figures, and thus derive the average cost per mile. The plaintiff did not deny the accuracy of the figures but objected to their admissibility on the ground of remoteness and irrelevancy to the issue. The lack of uniformity in costs which necessarily exists in various sections of the system warranted the rejection of this evidence by the judge in the exercise of a sound discretion. See Dow v. Bulfinch, 192 Mass. 281, 285, 286. For the same reason the figures showing the cost, over the entire system, of locomotive repairs, other locomotive supplies, enginehouse expenses, train supplies and expenses and the total freight expenses for the month of December, 1921, were properly excluded.

The defendant has not been harmed by the admission of any evidence relating to the profit derived by the plaintiff from freight movements. The judge instructed the jury in accordance with the plaintiff's third additional request that "In considering any offsets to the plaintiff's right to recover the value of $15,000 payment, you should exclude from your consideration any interference to the plaintiff's

[fol. 91] traffic by reason of switching movements, so called, for which the plaintiff was entitled to additional compensation and for which they claim no profits in this action. That, you see, refers to the provision in the contract allowing the Boston & Albany two dollars for transfer or switching to Boston & Maine or New York, New Haven & Hartford connections and thirty cents for taking cars in the Springfield yard. This excludes from your consideration any testimony in regard to delays in the Springfield yard due to switching Central New England freight cars and making up or breaking up Central New England trains. As these switching movements would be paid for under another part of the contract, this evidence falls within the agreement of counsel and is not to be considered by you. Also you should disregard any figures in regard to delays or whether due to freight cars or freight trains operated between the west end of West Springfield yard and Springfield, as these items also fall within that part of the contract for which the plaintiff is claiming no damage * * * You may consider, however, in assessing damages, what offsetting benefits the plaintiff has received by reason of being relieved of the operation of trains over its railroad as distinguished from switching operations I have referred to. And in this connection I grant the following requests for instruction: '(1) The plaintiff cannot set off against any benefit to be derived by it because of the failure of the defendant to operate the full number of trains allowed by the contract, any possible profit to be derived by the plaintiff from switching operations or other supplementary privileges mentioned in the contract; (2) The jury cannot consider any figures relating to profit to be derived from switching operations to and from West Springfield yard to the Boston & Maine, New York, New Haven & Hart-[fol. 92] ford or Springfield freight house; (3) The plaintiff * * * is not and does not claim to be entitled to any profit which may have accrued to it by reason of those special switching or transfer operations * * *; (4) The jury will not consider any figures relating to revenue or expenses to be derived from the transfer of cars to and from the West Springfield yard and the Boston & Maine Railroad, the New York, New Haven & Hartford Railroad, or for points in Springfield except as I have al-

ready intimated to you'; and '(5) The jury shall not consider any benefits resulting to the plaintiff by reason of freedom from interference caused by transfers from and to the West Springfield yard and the Boston & Maine Railroad, the New York, New Haven & Hartford Railroad, or for points in Springfield.' "

The defendant argues that its exception to the granting of this last request should be sustained for the reason that "the breaking up Central New England trains" was not within the subject matter of its disclaimer. If the words "the breaking up Central New England trains" are read in their context, it is apparent that the judge was referring to movements of trains for which the Boston & Albany Railroad Company was entitled to specific compensation. The instruction is somewhat lacking in clarity, but if read in its entirety it indicates that the jury were to take into consideration, in determining the benefit derived by the Boston & Albany Railroad Company from the cessation of operation, all interference from trains and cars, except those for the movement of which under the terms of the contract it was entitled to specific compensation in addition to the annual rental. The words "breaking up" were not used in the sense the defendant contends they were used. It follows that this exception must be overruled.

[fol. 93] The defendant offered to show "that the right of way of the Boston & Albany Railroad Company between the west end of the West Springfield yard and Agawam Junction, Massachusetts, over which run the tracks of the said Boston & Albany Railroad Company and over which are operated the trains of the Boston & Albany Railroad, New York Central Railroad Company, lessee, is not and was not in 1898 and 1899 owned in fee by the Boston & Albany Railroad Company for a distance of more than 1200 feet; that for said distance of 1200 feet said right of way was obtained under and by virtue of a location made by the Western Railroad Company in pursuance of provisions of Chapter 116 of the acts of the Legislature of Massachusetts for 1833 and by virtue of a confirmatory location of the Boston & Albany Railroad Company." An exception was saved by the defendant to the exclusion of this offer. The offer of proof was rightly excluded. A statutory taking for general railroad purposes is broad

enough to permit the agreement entered into by the parties in the present case. See Morse v. Goddard, 13 Met. 177, 179, Gage v. Campbell, 131 Mass. 566, and Curtis v. Goodwin, 232 Mass. 538, 541.

The third paragraph of the agreement between the parties provided that the Boston & Albany Railroad Company should, among other things, "take care of passenger trains in its passenger yard." The judge left to the jury the question whether these words meant simply that the Boston & Albany Railroad Company was to place the cars as they were needed by the Central New England Railway Company or whether it was to sweep out the cars and wash the car windows, and instructed the jury in this connection that the manner in which the parties by their conduct interpreted this clause was to be taken into consideration. It is not, and could not be, contended successfully that the tes-[fol. 94] timony of the vice-president of the Boston & Albany Railroad Company to the effect that the plaintiff was obligated under the agreement to sweep out the cars and wash the car windows was binding upon the plaintiff. The words as used in the contract were of doubtful meaning and, therefore, the exception of the defendant to the instruction given must be overruled. Boston & Albany Railroad v. New York Central Railroad, 256 Mass. 600, 609.

We have considered all the exceptions of the defendant and find no reversible error, provided within ten days after rescript the plaintiff amends its writ by substituting the words "The Boston & Albany Railroad Company, Assignor for the benefit of The New York Central Railroad Company, Assignee," in place of the words "The New York Central Railroad Company" as plaintiff therein, leave to make such amendment being hereby granted. Currier v. Howard, 14 Gray, 511, 513. Pizer v. Hunt, 253 Mass. 321, 331. Since the defendant's exceptions are overruled the plaintiff consents that its exceptions be overruled.

Exceptions of defendant overruled.

Exceptions of plaintiff overruled.

[fol. 94a] Certificate to foregoing paper omitted in printing.

[fol. 95] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD TO ACCOMPANY THE DEFENDANT'S PETITION FOR AND WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

In view of the petition for certiorari which the defendant contemplates filing in the Supreme Court of the United States, and the defendant's desire to omit certain portions of the record of the States court, it is stipulated and agreed between the parties that the defendant does not thereby seek to raise and does not intend to raise any question concerning the measure of damages applied by the State courts; that said petition does not present and is not intended to present any question as to the legal execution and validity of the contract in suit except as it may be claimed to have been affected by the order of the Interstate Commerce Commission issued September 8, 1921, nor any claim that the plaintiff and its assignees have failed to perform said contract so far as it and they were permitted by the defendant to perform it.

[fol. 96] It is therefore hereby stipulated and agreed by and between the parties herto that in connection with the record to be printed for use with the defendant's petition to the Supreme Court of the United States for a writ of certiorari and the record for use with any writ of certiorari which may issue from said Supreme Court of the United States on said petition a considerable portion of the record as printed for use in the Supreme Judicial Court of the Commonwealth may be omitted as provided in the paragraph numbered I as hereinafter set out and that this stipulation, including the following sections numbered II, III, IV, V and VI, shall be printed as part of any record to be used with said petition for certiorari or with any writ issued thereon.

I. In the Defendant's Substitute Bill of Exceptions as printed for said Supreme Judicial Court of the Commonwealth the following portions may be omitted:

1. Beginning with the 9th line on page 17, through the 13th line on page 17, inclusive.

2. Beginning with the 15th line on page 17, through the first full paragraph ending in the 7th line from the bottom of page 20.

3. Beginning in the second line from the bottom of page 20 after the words "The witness," through the sentence ending with the words "Union Station" in the 3rd line of page 21.

[fol. 97] 4. Beginning with the words, "The passenger yard" in the 8th line of page 21 through and including the first full paragraph ending in the 6th line on page 22.

5. Beginning with the sentence in the 21st line on page 22: "I have seen that junction point——" through the end of that paragraph ending in the 11th line from the bottom of page 22.

6. The paragraph beginning with the 17th line on page 24 and ending in the 14th line from the bottom of page 24.

7. Beginning at the top of page 25, through the sentence ending, "very, very small" in the 14th line from the bottom of page 30.

8. Beginning with the words "As a general superintendent" in the bottom line of page 30 through and including the word "yard" in the 25th line of page 31.

9. Beginning with the words, "I was familiar" in the 29th line of page 31 through and including the word "trains" in the 7th line from the bottom of page 31.

10. Beginning with the words, "To the best" in the 4th line from the bottom of page 31 through the first full paragraph on page 32, ending with the words "with it."

11. Beginning with the 18th line on page 32 through the word "Springfield" in the 22nd line of page 32.

12. Beginning with the words, "From 1902" in the 8th line from the bottom of page 32, through the first full paragraph on page 34 ending with the words "make it safe."

13. Beginning with the sentence commencing in the 12th line from the bottom of page 34 with the words "A tower is for" through the sentence ending in the 7th line of page 35 with the words "signal tower."

[fol. 98] 14. Beginning with the sentence commencing in the 10th line on page 35, "to the best of my knowledge——" through the sentence ending in the first line at the top of page 37 with the words "freight trains."

15. Beginning with the sentence in the 3rd line on page 37 commencing with the words "I recognize——" through the paragraph ending in the 8th line of page 37.

16. Beginning with the words "I am familiar" in the 12th line of page 37, through and including the 22nd line on page 37.

17. Beginning with the sentence commencing in the 11th line of page 38, with the words "After December 15, 1921" through the sentence ending in the 16th line on page 38, with the words "trips per day"

18. Beginning with the sentence "On cross-examination" in the 14th line from the bottom of page 38, through and including the statement of Mr. Hall in the 14th line on page 58.

19. Beginning at the top of page 59 through and including the paragraph ending in the 9th line of page 64.

20. Beginning with the paragraph commencing in the 13th line on page 64, through the words "First witness" in the 10th line from the botom of page 64.

21. Beginning with the 7th line from the bottom of page 64, through the words "Mr. Regan also" in the 9th line of page 65.

22. Beginning with the phrase, "that price is paid" in the 11th line on page 65, through the paragraph ending in the 17th line of page 69.

[fol. 99] 23. Beginning with the 3rd line from the bottom of page 69, through the paragraph ending in the 11th line of page 70.

24. Beginning with the 28th line of page 70, through and including the 2nd line from the bottom of page 70.

25. Beginning with the 15th line on page 71 and running to the 5th line from the bottom of page 72.

26. Beginning with the words "During this" in the 7th line on page 73 and running to the 20th line on page 107, both inclusive.

27. Beginning with the 14th line on page 108 and running to the 3rd line from the bottom of that page, both inclusive.

28. Beginning with the 10th line on page 109 and running to the 12th line from the bottom of page 110, both inclusive.

29. Beginning with the 2nd line from the bottom of page 110 and running to the 20th line on page 112, bot inclusive.

30. Beginning with the 25th line on page 112 and running to the 3rd line from the bottom of page 114, both inclusive.

31. The words "(You may be seated, Mr. Foreman and gentlemen of the jury)" on page 115.

32. The 2nd line from the bottom on page 119 is to read, "if they do not say so" instead of "if they do say so."

33. Beginning with the 8th line on page 120, through and including the 13th line on page 126.

[fol. 100] 34. The words "That was taken care of" in the 14th line on page 126.

35. Beginning with the statement by the Court in the 18th line from the top of page 126, through and including the paragraph ending with the words "issue of benefits" in the 11th line from the bottom of page 128.

II. As to the 35 exhibits put in evidence at the trial in the Superior Court and referred to and made a part of the defendant's bill of exceptions, it is hereby agreed by and between the parties hereto as follows:

1. Exhibits 1 and 2 need not be set out or printed in full, it being agreed that the quotations from them set out in the Defendant's Substitute Bill of Exceptions are correct, that no question is raised as to their execution or legality nor to their effectiveness as assignments of all rights of the Boston & Albany Railroad Company to and under the contract in suit, nor to the fact that by them the assignees assumed all the obligations of the Boston & Albany Railroad Company under said contract, nor that the respective assignees performed all said obligations during their control of the Railroad Company as such assignees until December 15, 1921.

2. Exhibits 3, 5, 7, 8, 11 to 21 inclusive, 24, 25, 26, 28, 31 and 32 are to be incorporated in full and made a part of the record.

3. Exhibits 22, 23 and 29 are hereby referred to and made a part of the record as specified in the original record, but said Exhibits 22, 23 and 29 need not be otherwise printed or set out.

[fols. 101 & 102] 4. Exhibits 4, 6, 9, 10, 27, 30, 33, 34, 35, B for identification, and C for identification, are to be omitted.

III. It is further stipulated and agreed that the date of plaintiff's writ in this action was April 5, 1922.

IV. It is further stipulated and agreed that the Plaintiff's Bill of Exceptions which presented only exceptions of the plaintiff to the Court's rulings on the measure of damages, and which the plaintiff stipulated might be overruled by the Supreme Court of the Commonwealth, if that Court overruled the defendant's exceptions, may be omitted from the record.

V. It is further stipulated and agreed that by the execution of this stipulation the plaintiff is not to be deemed to have made any admission as to the materiality of the matter that remains in the Defendant's Substitute Bill of Exceptions.

VI. This stipulation when executed and filed is to become a part of the record in the case and is to be printed as such and those portions of the Defendant's Substitute Bill of Exceptions which are omitted by this stipulation are to be indicated by asterisks when the balance of said substitute bill of exceptions is printed for use in the Supreme Court of the United States.

George L. Mayberry, Lowell A. Mayberry, Attorneys for Boston & Albany Railroad Company, Assignor for the benefit of New York Central Railroad Company. John L. Hall, Marcien Jencker, Attorneys for Central New England Railway Company.

Endorsed on cover: File No. —. Massachusetts Superior Court for Suffolk County. Term No. —. Central New England Railway Company, petitioner, vs. Boston & Albany Railroad Company, assignor, for the benefit of New York Central Railroad Company, assignee. Petition for writ of certiorari and exhibit thereto. Filed —— —, 1928. File No. —.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1928

No. 532

CENTRAL NEW ENGLAND RAILWAY COMPANY, Petitioner,

v.

BOSTON & ALBANY RAILROAD COMPANY, Assignor, for the Benefit of New York Central Railroad Company, Assignee

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR A WRIT OF CERTIORARI UNDER SECTION 8 (a), ACT OF FEBRUARY 13, 1925

On consideration of the motion of counsel for the petitioner in the above entitled cause, and good cause therefor having been shown,

It is now here ordered that the time within which a petition for a writ of certiorari may be filed herein be, and the same is hereby, extended for a period of fifteen (15) days from this date.

Dated this 27th day of October, 1928.

Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States.

[Endorsed:] File No. 33,841. Supreme Court U. S., October Term, 1928. Term No. 532. Central New England Ry. Co., petitioner, vs. Boston & Albany R. R. Co., assignor, etc. Order extending time within which to file petition for certiorari. Filed Oct. 27, 1928.

Supreme Court of the United States

Order Allowing Certiorari—Filed January 2, 1929

The petition herein for a writ of certiorari to the Superior Court for Suffolk County, State of Massachusetts, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5165)

( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No.

CENTRAL NEW ENGLAND RAILWAY COMPANY, PETITIONER,

vs.

BOSTON & ALBANY RAILROAD COMPANY, ASSIGNOR FOR THE BENEFIT OF NEW YORK CENTRAL RAILROAD COMPANY, ASSIGNEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT FOR THE COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS

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J60018

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 6, 1928

ORDER NO. 945 M&O

FORM A 9 — Jan-6-17.

DEPT NO. 3243

DATE Dec. 31, 1917

PLEASE REMIT TO TREASURER, GRAND CENTRAL TERMINAL, NEW YORK, NEW YORK. CHECKS SHOULD BE MADE PAYABLE TO THE ORDER OF THE BOSTON AND ALBANY R. R. (N. Y. C. R. R. CO., LESSEE). IF FURTHER INFORMATION IS REQUIRED, RETURN THIS BILL TO THE AUDITOR, SOUTH STATION, BOSTON, MASS.

IN REMITTING PLEASE QUOTE

ACCT'S DEPT. NO. 3072

MONTH OF

951

TO

BOSTON & ALBANY RAILROAD

N. Y. C. R. R. CO., LESSEE

Central New England Railway Company

DR.

DATE OF SERVICE	NATURE	AMOUNT	TOTAL
191	For joint facilities at Springfield from October 1, to December 31, 1917, at $15,000.00 per annum,		$3,750 00
	Op. Exp. 279 750. " " 413-U 187.50 Inc. Acc. 508 2812.50		

UNCOLLECTED BILL
RENTS

APPROVED

General Superintendent

EXAMINED AND REGISTERED

ENTERED FOR COLLECTION DEC 21 1917 AUDITOR

191

RECEIVED PAYMENT Three thousand seven hundred fifty - - - - - DOLLARS

TREASURER

1

FORM A 8

bm-4-17.

PLEASE REMIT TO TREASURER, GRAND CENTRAL TERMINAL, NEW YORK, NEW YORK. CHECKS SHOULD BE MADE PAYABLE TO THE ORDER OF THE BOSTON AND ALBANY R. R. (N. Y. C. R. R. CO., LESSEE). IF FURTHER INFORMATION IS REQUIRED, RETURN THIS BILL TO THE AUDITOR, SOUTH STATION, BOSTON, MASS.

DEPT. NO. 555

DATE Dec. 10, 1917

IN REMITTING PLEASE QUOTE
ACCT'S DEPT. NO. 8154
MONTH OF Nov 1917

TO
BOSTON & ALBANY RAILROAD
N. Y. C. R. R. CO., LESSEE

Central New England Railway Co.,
Hartford, Conn.

DR.

DATE OF SERVICE	NATURE	AMOUNT	TOTAL
191	For services of towermen at Agawam Junction in November, 1917		
	3 men 30 days @ $2.66	$239.40	
	Labor carrying water	7.52	
		$246.92	
	Supervision, Acct. etc. 10%	.75	
		$247.67	
	APPROVED [signature] General Superintendent		$247.67

EXAMINED AND REGISTERED

AUDITOR FOR COLLECTION
DEC 11 1917
Auditor of Revenue.
ENTERED FOR AUDIT
DEC 7 1917

191

RECEIVED PAYMENT Two Hundred Forty-
Seven & - - - - - - - - 67 DOLLARS
100

TREASURER

2

[fol. 3] EXHIBIT 28. H. E. B.

This agreement, Made this ninth day of May in the year eighteen hundred and ninety-eight, between The Boston and Albany Railroad Company, hereinafter called the Albany Company, of the first part, The Philadelphia, Reading and New England Railroad Company, hereinafter called the New England Company, of the second part, George A. Fletcher and others acting on behalf of the holders of securities of The Philadelphia, Reading and New England Railroad Company, of the third part, and The Hartford and Connecticut Western Railroad Company, of the fourth part, witnesseth:

Whereas, The parties of the second, third and fourth part, acting under such powers as they severally possess or may obtain, intend to reorganize the New England Company aforesaid, and to create a new corporation to be called The Central New England Railway Company to take and hold the property, leaseholds and franchises of said New England Company, and intend to locate and build a branch line from a point at or near Tariffville, Connecticut, to a point at or near West Springfield, Massachusetts, and there to connect with the lines of the Albany Company in accordance with the terms of this agreement;

Now therefore, It is agreed that, upon the creation and organization of said new corporation to be called The Central New England Railway Company, and upon the location and construction of said branch railroad connecting the lines owned or controlled by said Central New England Railway Company with the lines of the Albany Company, said Central New England Railway Company and said Albany Company shall enter into and make a contract each with the other of the substance and tenor following, that is to say:

First. The Albany Company from and after the opening of the proposed branch line for the passage of regular trains [fol. 4] until the Thirtieth day of August in the year Nineteen hundred and forty, shall license and permit, subject to the regulation and control of the Albany Company as to the movement and government of trains, the said Central New England Railway Company and its successors to pass with

trains and locomotives over the line of the Albany Company between the point of connection west of the Connecticut River and the yard and engine houses at West Springfield in each direction, and further for passenger trains across the bridge over the Connecticut River and into the Union Station at Springfield, with the right to use in connection with such trains all present and future water stations and other facilities necessary for the accommodation of such trains and the traffic to be transported by them, the said Central New England Railway Company paying to the Albany Company therefor Fifteen thousand Dollars ($15,000) per annum in equal quarterly payments on the first days of January, April, July and October of each year, the first payment to be made upon the first quarterly period next succeeding the opening of the proposed branch line for the passage of regular trains. If the daily average number of trains shall exceed three freight trains of not more than thirty cars in each train in each direction, and three passenger trains in each direction, the price to be paid shall be increased in the proportion in which the increased number of trains exceeds the number of trains aforesaid, and this computation shall be made once in six months during the term of this contract and payment shall thereupon be made accordingly. If the said Central New England Railway Company shall take water from any of the water stations of the Albany Company, it shall share in the expense [fol. 5] of maintaining such stations in proportion to the consumption of water by each of the parties thereto, including therein the price paid by the Albany Company for water. If the Central New England Railway Company shall use the stalls in the engine house of the Albany Company, it shall pay One Dollar ($1) per day for each stall so used. The said Central New England Railway Company shall be permitted to erect a coal platform or trestle for the loading of its supply coal at some convenient point to be mutually agreed upon.

Second. The Albany Company shall transfer or switch loaded freight cars brought by the Central New England Railway Company to the West Springfield yard to a connection with the Boston and Maine Railroad's lines or The New York, New Haven and Hartford Railroad Company's lines in Springfield in either direction for the rate or sum

of Two Dollars ($2) per car without regard to destination or contents of such car, and shall move such freight so brought by the Central New England Railway Company, designed for points in Springfield in carload lots, excepting coal, for the rate or sum of thirty (30) cents per ton of two thousand (2,000) pounds; the rate or sum for so moving coal shall be fifty (50) cents per ton of twenty-two hundred and forty (2240) pounds. The foregoing rates include the return of empty cars and the hauling of empty cars furnished by the Central New England Railway Company to be loaded on the lines of any other Company and then returned. For such freight as is required to pass through the freight house of the Albany Company the rate or sum to be charged shall be fifty (50) cents per ton of two thousand (2,000) pounds, and in addition thereto a charge for the labor of handling, based upon the proportion which the business of the Central New England Railway Company bears to the total amount of the business passing through such freight [fol. 6] house, to be computed monthly, and only to include the expense of labor in such freight house.

Third: The Albany Company for passenger business shall sell tickets, handle baggage and take care of passenger trains in its passenger yard, and transfer through passenger cars to connecting lines.

Fourth: The Central New England Railway Company shall build and maintain an interlocking tower and its connections at the point of junction of its road with the road of the Albany Company. The necessary men for the operation of said tower shall be appointed and paid by the Albany Company and primarily deemed to be the servants of the Albany Company. Their compensation, however, shall be reimbursed to the Albany Company by the Central New England Railway Company, quarterly.

Fifth. The employees of the Albany Company while operating any signal or throwing any switch or performing any duty in connection with the operation of the rolling stock shall be considered to be the servants of that one of said parties the moving of whose rolling stock called for such operation or performance, and in case of any accident arising from the acts, omissions or neglects of said employees, if such operation or performance is occasioned by

the moving of the rolling stock of both parties, if it can be ascertained by whose rolling stock the injury is actually done, that party shall be responsible, but if that cannot be ascertained, then the responsibility for that accident shall be borne by both parties equally. Each party shall be liable for any damage done through failure or defect of its equipment. The Albany Company shall be liable for any damage [fol. 7] done through the failure or defect of its roadway, but in case of any interruption of business by any accident or disaster, the Central New England Railway Company or its successors or transferees shall have only the same temporary opportunities for the use of the tracks of the Albany Company proportioned to its business as the Albany Company then has and enjoys for its own traffic. All responsibility for baggage brought to said Union Station by either company and destined to a station on the road of the other Company shall be upon the forwarding company after such baggage is unloaded at said Union Station, and all responsibility for baggage delivered at said station to be forwarded by the Central New England Railway Company shall be upon said Central New England Railway Company from the time of its delivery, and all responsibility for baggage received at said station from said Central New England Railway Company for delivery in Springfield shall be upon the Central New England Railway Company from the time of such receipt until the same is delivered.

Sixth: The Central New England Railway Company and its successors shall make the payments required by this contract in accordance with the terms thereof.

Seventh: No transfer of this contract or the rights under it, in whole or in part, shall be made by the said Central New England Railway Company or its successors without the consent in writing of the Albany Company, and this contract is made upon this condition, that in case of a breach of any of the stipulations to be observed on the part of the Central New England Railway Company or of those claiming under it and a continuance of such breach for thirty days, or in case the rights under this contract shall be taken from [fol. 8] said Central New England Railway Company or its successor or transferee by process of law, by proceedings in bankruptcy or insolvency or for a receivership or otherwise,

the Albany Company or its successors may, while the default or neglect continues, or at any time after such taking by process of law, and notwithstanding any license or waiver of any prior breach of condition, without any notice or demand, terminate this contract and all rights acquired thereunder by the Central New England Railway Company or any person claiming by, through or under it.

In witness whereof, the parties hereto have hereunto set their names, or affixed their corporate seals duly attested, the day and year first aforesaid.

The Boston and Albany Railroad Company, by Edward D. Hayden, Vice-President. Attest: E. D. Hayden, Secretary. The Philadelphia, Reading and New England Railroad Company, by John W. Brock, President. Attest: W. R. Taylor, Secretary. Reorganization Committee, by George A. Fletcher, Chairman. Attest: J. W. Hamer, Secretary. The Hartford and Connecticut Western Railroad Company, by H. O. Seixas, President. Attest: E. R. Beardsley, Secretary.

[fol. 9] State of New York,
County of New York, ss:

On the 10th day of May in the year 1898, before me personally came John W. Brock, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in Philadelphia, Pennsylvania; that at the time of the execution of the foregoing instrument he was President of The Philadelphia, Reading and New England Railroad Company; that he knew the corporate seal of said Philadelphia, Reading and New England Railroad Company; that the seal affixed to the foregoing instrument was such corporate seal; that it was affixed by order of the board of directors of said Philadelphia, Reading & New England Railroad Company; and that he signed his name thereto by like order as President of said Philadelphia, Reading and New England Railroad Company; and the said John W. Brock, as such President of said Philadelphia, Reading and New England Railroad Company, also acknowledged before me that the foregoing instrument is the free act and deed of said Philadelphia, Reading and New England Railroad Company and of himself individually.

In witness whereof, I have hereunto set my hand and affixed my official seal this 10th day of May A. D. 1898.

P. M. Beam, Notary Public, Queens Co., Cert. filed in N. Y. Co. (Seal.)

[fol. 10] Acknowledgment (Notary)

State of Pennsylvania,
County of Philadelphia, ss:

I, M. Russell Thayer, Prothonotary of the County of Philadelphia and Clerk of the Courts of Common Pleas, of said County, which are Courts of Record, having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify, that J. H. Jefferies Esquire, whose name is subscribed to the certificate of the acknowledgment of the annexed Instrument and thereon written, was at the time of such acknowledgment a Notary Public for the Commonwealth of Pennsylvania, residing in the county aforesaid, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of Deeds or Conveyances for lands, tenements and hereditaments in said State of Pennsylvania and to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere, and that I am well acquainted with the handwriting of the said Notary Public and verily believe the signature thereto is genuine, and I further certify that the said Instrument is executed and acknowledged in conformity with the Laws of the State of Pennsylvania.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 13th day of May in the year of our Lord one thousand eight hundred and ninety-eight (1898).

M. Russell Thayer, Prothonotary. (Seal.)

[fol. 11] State of Pennsylvania,
County of Philadelphia, ss:

On the 13th day of May A. D. 1898, before the undersigned, a notary public of the State of Pennsylvania, residing in the City of Philadelphia, duly commissioned, personally came the above named George A. Fletcher, who in due form of law acknowledged the foregoing indenture to

be his act and deed and desired that the same might be recorded as such.

Witness my hand and official seal the day and year above named.

J. H. Jefferies, Notary Public. (Seal.)

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On the 13th day of May A. D. 1898, before me the undersigned, a notary public of the State of Pennsylvania, residing in the City of Philadelphia, duly commissioned, personally came the above named John W. Hamer, who in due form of law acknowledged the foregoing indenture to be his act and deed, and desired that the same might be recorded as such.

Witness my hand and official seal the day and year above named.

J. H. Jefferies, Notary Public. (Seal.)

[fol. 12] STATE OF NEW YORK,
County of New York, ss:

On the 10th day of May in the year 1898, before me personally came Henry O. Seixas, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the City of New York and State of New York; that at the time of the execution of the foregoing instrument he was President of the Hartford and Connecticut Western Railroad Company; that he knew the corporate seal of said Hartford and Connecticut Western Railroad Company; that the seal affixed to the foregoing instrument was such corporate seal; that it was affixed by order of the board of directors of said Hartford and Connecticut Western Railroad Company; and that he signed his name thereto by like order as President of said Hartford and Connecticut Western Railroad Company; and the said Henry O. Seixas, as such President of said Hartford and Connecticut Western Railroad Company, also acknowledged before me that the foregoing instrument is the free act and deed of said Hartford and Connecticut Western Railroad Company and of himself individually.

In witness whereof, I have hereunto set my hand and affixed my official seal this 10th day of May A. D. 1898.

P. M. Beam, Notary Public, Queens Co., Cert. filed in N. Y. Co. (Seal.)

[fol. 13] At a meeting of the Board of Directors of The Boston and Albany Railroad Company duly called and held at its office in Boston on Tuesday, the 24th day of May, 1898, the following vote was passed:

Voted:

That the Vice President is hereby authorized to execute, acknowledge and deliver in the name and on behalf of this Company, an agreement with the Philadelphia, Reading and New England Railroad Company, George A. Fletcher, acting on behalf of the holders of securities of the Philadelphia, Reading and New England Railroad Company, and the Hartford and Connecticut Western Railroad Company, that upon the creation and organization of a new corporation to be called The Central New England Railway Company, and upon the location and construction of a branch Railroad connecting the lines owned or controlled by said Central New England Railway Company with the lines of The Boston and Albany Railroad Company at or near West Springfield, The Boston and Albany Railroad Company will execute and deliver a contract with said Central New England Railway Company to license and permit the passage of trains and locomotives of said Central New England Railway Company over the lines of The Boston and Albany Railroad Company from the point of connection of said roads and the station in Springfield, and containing the terms for passenger and freight traffic agreed upon and expressed in this preliminary contract.

A true copy. Attest: E. D. Hayden, Secretary and Clerk. (Seal.)

[fol. 14] Commonwealth of Massachusetts,
County of Suffolk, ss:

On this 25th day of May, 1898, personally appeared Edward D. Hayden to me known, and who, being by me duly

sworn, says that he resides in the City of Woburn, County of Middlesex and Commonwealth of Massachusetts, and is the Vice President of The Boston and Albany Railroad Company described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the foregoing instrument is the corporate seal of said Company and was thereto affixed by order of the Board of Directors of said Company, and that he signed the same as Vice President of The Boston and Albany Railroad Company by virtue of a like order of the said Board of Directors; and said Edward D. Hayden also acknowledged before me that the foregoing instrument is the free act and deed of the said Boston and Albany Railroad Company.

Frank H. Ratcliffe, Notary Public. (Seal.)

[fol. 15] EXHIBIT 32. A. E. B.

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commere Commission, do hereby certify that the attached is true copy of the following:

Application filed June 15, 1921;
Return to questionnaire filed August 5, 1921; and
Report and certificate of the Commission filed and entered September 8, 1921, in Finance Docket No. 1479, In the Matter of the Application of the Central New England Railway Company for a Certificate of Public Convenience and Necessity,

the originals of which are now on file and of record in the Office of this Commission.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 26th day of January, A. D. 1927.

George B. McGinty, Secretary of the Interstate Commerce Commission. (Seal.)

[fol. 16] BEFORE THE INTERSTATE COMMERCE COMMISSION

Bureau of Finance

Finance Docket No. 1479. Application No. —

Application of CENTRAL NEW ENGLAND RAILWAY COMPANY for a Certificate of Public Convenience and Necessity under Paragraphs 18 to 22, Inclusive, of Section 1 of the Interstate Commerce Act, as Amended by the Transportation Act, 1920

Central New England Railway Company, a corporation organized under the laws of the State of New York, makes application to the Interstate Commerce Commission for a certificate of public convenience and necessity under Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, permitting the abandonment of operation of its line between Feeding Hills, Massachusetts, and Agawam Junction, Massachusetts, and states:

1. The postoffice address of applicant and of C. L. Bardo, President, A. E. Clark, Secretary, and E. G. Buckland, General Counsel, is 71 Meadow Street, New Haven, Connecticut.

2. The making and filing of this application has been approved at a meeting of the Board of Directors on May 3rd, 1921, at New Haven, Connecticut.

3. That applicant operates a branch line from Tariffville, Connecticut, to a junction with the Boston & Albany Railroad known as Agawam Junction near the border line between the towns of Agawam and West Springfield, Massachusetts, and proposes to abandon the operation of that portion of said branch between the station at Feeding Hills in the town of Agawam and said junction, all said portion of line being in Hampden County, Massachusetts, and, in addition, to abandon the operation of its trains between said junction and Springfield, Massachusetts, over the tracks of the Boston & Albany Railroad.

4. Applicant's lines are operated as a part of the system of The New York, New Haven and Hartford Railroad Company, and all freight on said Tariffville branch destined to and from Springfield and beyond can be handled over applicant's main line and the New York, New Haven and

Hartford Railroad via Hartford, Connecticut. Passenger service is furnished between Feeding Hills and Springfield by an electric line.

5. Applicant desires such hearing as the Commission may deem necessary.

Central New England Railway Company, by C. L. Bardo, President.

[fol. 17] Verification

STATE OF CONNECTICUT,
County of New Haven, ss:

C. L. Bardo makes oath and says that he is the President of Central New England Railway Company; that he has carefully examined each and all of the statements contained in the foregoing application; that they are true and correct to the best of his knowledge and belief; that said application is made with the approval and at the direction of the Board of Directors of the applicant, as appears by the minutes of said Board of May 3rd, 1921; and that he has been authorized by said Board to make said application.

C. L. Bardo.

Subscribed and sworn to before me, a Notary Public in and for the State and County above-named, this 10th day of May, 1921. Edmund Mason. My commission expires February 1, 1925.

[fol. 18] Aug. 5, '21. 708,274

Central New England Railway Company

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 1479

Original Questionnaire

In the Matter of Application under Paragraphs 18 to 21, Inclusive, Section 1, of the Interstate Commerce Act for Certificate of Public Convenience and Necessity Authorizing the Abandonment of the Portion of Line Between Feeding Hills and Agawam Junction, Massachusetts

New Haven, Connecticut, August 5th, 1921.

[fol. 19] Central New England Railway Company, having made application to the Interstate Commerce Commission

under paragraph 18 of section 1 of the Interstate Commerce Act, as amended, for authority to abandon the operation of that portion of its Tariffville Branch, so-called, between the station of Feeding Hills in the town of Agawam and the junction of said branch with the Boston & Albany Railroad at Agawam Junction, so called, near the border line between the towns of Agawam and West Springfield, Massachusetts, all said portion of line being in Hampden County, Massachusetts, and in connection therewith to abandon the operation of its trains between said junction and Springfield, Massachusetts, over the tracks of the Boston & Albany Railroad, which application is filed in the office of the Commission in Finance Docket No. 1479, hereby affirms that the notice of the application has been published in the form prescribed by the Commission, at least once during each of three consecutive weeks, in the "Springfield Republican" on June 24th, July 1st, and July 8th, 1921; that said newspaper is of general circulation in Hampden County, Massachusetts, which is the only County and State in which the line of railroad operation of which is proposed to be abandoned is situated; and the identified newspaper clipping hereto attached contains a true copy of the notice as published in said newspaper. The applicant also submits the following information required by the Commission:

1. When the line in question was constructed, for what purpose or purposes, and its history as an operating unit from the time of construction up to the date of this return.

On May 9th, 1898, the Philadelphia, Reading and New England Railroad Company, the Boston and Albany Railroad Company, the Hartford and Connecticut Western Railroad Company and the Reorganization Committee of the Philadelphia, Reading and New England Railroad Company executed a contract for a term of years to August 30th, 1949, providing for the construction of the Springfield Branch of the Hartford and Connecticut Western Railroad Company from Tariffville to Agawam Junction, with joint facilities and trackage rights over the Boston and Albany Railroad from Agawam Junction to the Union Station at Springfield, Massachusetts. It was opened for operation September 21st, 1902, partly over the East Granby and Suffield Railroad. This line was constructed for the pur-

pose of giving the Hartford and Connecticut Western Railroad an entrance into the City of Springfield, Massachusetts.

The Hartford and Connecticut Western Railroad Company in 1899, under authority of an Act of Connecticut passed May 19th, 1887 (Spec. Laws, Vol. 10, page 746) and an Act of Massachusetts passed June 3rd, 1889 (Chap. 386 as amended by Chap. 121, 1896) commenced the construction of the branch from Tariffville, Connecticut, to a point on the line of the Boston and Albany Railroad at Agawam, Massachusetts. There was some difficulty in completing that portion of the branch in the towns of East Granby and Suffield and the East Granby and Suffield Railroad was incorporated on August 12th, 1901, for the purpose of constructing a railroad from a point on the Springfield Branch of the Hartford and Connecticut Western Railroad [fol. 20] in the town of East Granby to a point on the same branch in the town of Suffield, about 4.2 miles.

The railroad was opened on September 21st, 1902, and on the same date the portions of the branch of the Hartford and Connecticut Western Railroad from Tariffville to Agawam were opened for operation which gave the Hartford and Connecticut Western Railroad a line from Tariffville, Connecticut, to Agawam, Massachusetts. On January 2nd, 1903, the East Granby and Suffield Railroad Company leased its railroad to the Central New England Railway Company for one year from January 1st, 1903. The Hartford and Connecticut Western Railroad Company was later enabled to complete the construction of the original branch in East Granby and Suffield which it opened for operation on March 9th, 1903, thus forming its present branch between Tariffville and Agawam, a distance of 14.35 miles. On August 30th, 1889, the Hartford and Connecticut Western Railroad Company leased its railroad and property to the Central New England and Western Railroad Company for one year. On February 4th, 1890, a new lease was made for fifty years from August 30th, 1890. The Hartford and Connecticut Western Railroad Company ceased to operate its property on August 30th, 1889. On August 25th, 1889, the Central New England Railway Company entered into a contract with the Boston and Albany Railroad Company supplemental to the contract of May 9, 1898, but for the same term; namely, August 30th, 1940, providing for joint

facilities and trackage rights between Agawam and Springfield, this contract providing that the Central New England Railway Company shall pay to the Boston and Albany Railroad Company $15,000.00 per annum, payable quarterly, if not more than three freight trains of thirty cars each in each direction shall be run and not more than three passenger trains in each direction, whatever number above this shall be run, the rental shall be increased in proportion to the increase of traffic. This agreement is in force at this date.

2. The general history of any past or existing receivership covering the line.

Since the Hartford and Connecticut Western Railroad Company was incorporated, March 31st, 1881, by an Act of Connecticut (Spec. Law, Vol. IX, page 169), and a Trustee's deed from David P. Nichols, Treasurer of the State of Connecticut, dated July 30th, 1881, recorded Vol. 2, page 285, Secretary of State of Connecticut, was executed and delivered to it, covering all the property rights and franchises of the Connecticut Western Railroad Company, as provided in the Act, there has been no receivership existing covering this line.

[fol. 21] 3. The investment cost of the line as shown by the applicant's books, stated as nearly as possible according to the primary accounts prescribed in the Interstate Commerce Commission classification of investment in road and equipment.

(Here follow side folio pages 22 and 23)

[fol. 24] 4. Whether any aid, gift, grant or donation of anything of value was contributed in consideration of its construction.

From the records as kept it is impossible to determine whether there was any aid, gift, grant or donation in consideration of the construction of the line in question.

5. The amount and description of any bonds, notes or other evidences of indebtedness resting in whole or in part upon the line in question, or upon the earnings thereof, or upon the earnings of any other line or lines of the applicant not covered by the application, and of any evidences of in-

	Total Amount	Account No. 1	Account No. 2	Account No. 3	Account No. 6	Account No. 8	Account No. 9	Account No.10	Account No.11
Year Ending June 30, 1907									
No A. & B. reported									
Year Ending June 30, 1908									
173 Feeding Hills,Mn.,S/T R. A. Bllogg	134.79	2.10				114.82			
Cost of materials removed from siding at Agawam Jct.,Mn.	496.26						340.20	154.06	
	859.97								
Year Ending June 30, 1909									
256 E. Granby,Ct., Land	400.00		400.00						
Year Ending June 30, 1910									
364 Feeding Hills,Mn.,Widening Sr. #13-A	1,740.39	No primary accounts stated in Construction books.							
369 E.Granby,Ct., Sidetrack	193.64	" "	"	"	"	"			
	1,934.03								
Year Ending June 30, 1911									
No A. & B. reported									
Year Ending June 30, 1912									
364 Feeding Hills,Mn.,Widening Br. #13-A	10.20				3.20				
388 Agawam Jct.,Mn., Interlocking Plant	3,917.07								
431 E.Granby,Ct.,Relocate Roadway at Station	569.88	4.28							
	4,527.15								
Year Ending June 30, 1913									
488 E.Granby,Ct.,Renew Br. #802-B	668.23	20.00	159.84						
487 Feeding Hills,Mn.,Frt.Hse.	899.46	2.75							
469 " " " Land	3,011.05		3,011.05						
	4,578.74								
Year Ending June 30, 1914									
408 E.Granby,Ct., Renew Br.#307-B	1,425.84	6.06							
469 Feeding Hills,Mn., Land	25.00								25.00
	1,450.34								
Year Ending June 30, 1915									
364 Feeding Hills,Mn.,Ext.Siding	59.91					22.75	32.39	4.77	
--- E.Granby,Ct., Real Estate	100.00		100.00						
503 Tariffville,Ct., Real Estate	250.00		250.00						
502 E.Granby,Ct.,Repl.frame platform	225.83								
	635.74								
Year Ending December 31, 1915									
344 Freemans,Ct., Ext. Br. #10.42	86.60	16.10			70.50				
366 Feeding Hills,Mn.,Concrete Foot Br. #11.13	20.86	3.28			17.66				
529 Tariffville,Ct.,Ren.Br. #11.05	36.49	6.19			30.00				
444 " Strength " "	29.36	29.36							
	173.08								
Forward-	13,207.38	90 16	3,220.89		121 35	137.57	307.81	149.08	25.00

	Account No. 2	Account No. 3	Account No. 6	Account No. 8	Account No. 9	Account No.10	Account No.11	Account No.12	Account No.15	Account No.16	Account No.27	Account No.76
.10				114.82				17.37				
					540.20	156.05						
	400.00											

ummary accounts stated in Construction books.

			3.20							7.00		
											3,927.07	
8.28										585.80		
0.00	159.84								488.39			
2.75	3,011 05									896.71		
8 06							88.00		2,419 29			
				22.75	32.39	4.97		9.80				
	100.00											
	260.00									225.88		
6.10			70.80									
3.28			17.66									
6.19			30.00									
9.36												
0 16	3,220.69		121 35	137.57	309.81	149.09	25.00	27.17	2,917.68	1,263.36	3,927.07	

		Total Amount	Account No.1	Account No.2	Account No.3	Account No.6	Account No.8	Account No.9	Account No.10	Account No.11
	Brought Forward	18,207.38	90.16	3,220.89		781.95	139.89	307.81	149.09	85.00
Year Ending December 31,1917										
866	Feeding Hills,Ms. Concrete Foot Br. @11.15	1,041.30				17.65				
639	Tariffville,Ct., Remew Br. @11.06	173.53	1.61			176.14				
866	Tariffville,Ct.,Streng. Br. @11.06	84.15	84.15							
709	Feeding Hills,Ms.,Br.@12.27	138.72								
---	Tariffville,Ct.,Remew Br. @12.07	86.35	58.35							
		1,496.11								
Year Ending December 31, 1918										
864	Freeman's,Ct.,Reb.Br.10.42	1,388.84				1,388 84				
866	Tariffville,Ct.,Streng. Br. @11.06	939.48				939.48				
		2,328.37								
Year Ending December 31, 1919										
864	Freeman's,Ct.,Reb.Br.@10.42	2,431.91	6.60			2,425.31				
Year Ending December 31, 1920										
864	Freeman's,Ct.,Reb.Br.@10.42	1,318.04	6 60		2,212.40	953.46	69.94		30.00	10.00
866	Tariffville,Ct., Strength. Br.@11.06	3,643.61	6.79			3,636.82				
		4,961.65								
January,February,March 1921										
866	Tariffville,Ct.,Strength. Br. @11.06	351.88	31.86			320.22				
	Total July 1,1906 to March 31,1921	34,677.26	368.60	3,220.89	2,212.40	7,936.06	67.81	307.81	179.09	35.00
	Cost to June 30,1906	476,556.78								
	Total to March 31,1921	501,234.04								

Account No.2	Account No.3	Account No.6	Account No.8	Account No.9	Account No.10	Account No.11	Account No.12	Account No.15	Account No.16	Account No.27	Account No.76
3,220.09		382.35	139.89	307.81	149.03	35.00	27.17	2,917.68	1,268.26	3,927.07	
		17.65						1,058.95			
		176.14									
								138.78			
		1,288 84									
		988.49									
		2,438.31									
	2,212.40	953.46	69.96		30.00	10.00	27.30				188.86
		5,636.82									
		320.22									
3,220.09	2,212.40	7,936.06	67.61	307.81	179.03	35.00	.13	4,118.41	1,268.26	3,927.07	188.86

debtedness not resting specifically upon the line in question, but which may be affected by the proposed abandonment.

The First Mortgage Four and One Half Per Cent. Bonds of the Hartford & Connecticut Western Railroad Company, aggregating $700,000, maturing July 1st, 1923, issued under an indenture of mortgage to the Treasurer of the State of Connecticut, Trustee, rest in part on the line in question and upon the earnings thereof. There is also outstanding a demand note of the Hartford and Connecticut Western Railroad Company held by the Central New England Railway Company in the amount of $819,781.71 at 5%, but said note creates no specific lien; it is an unsecured promise to pay.

Central New England Railway Company has outstanding the following evidences of indebtedness:

C. N. E. 1st Mtge. 4% 50 Yr. Gold Bonds	$14,650,000 00
Dutchess County Railroad 1st Mtge. 4½% Bonds	287,000 00
C. N. E. Genl. Mtge. 5% Bonds	6,000 00
C. N. E. Serial 6% Notes to Secretary Treasury of United States:	
Dated Nov. 15, 1920, due Nov. 15, 1931	60,000 00
" " " " " " " 1932	60,000 00
" " " " " " " 1933	60,000 00
" " " " " " " 1934	60,000 00
" " " " " " " 1935	60,000 00
Total	$15,243,000 00

None of the mortgage bonds of the Central New England Railway Company rest in whole or in part on the line in question or its earnings, but are secured by a mortgage of the owned lines of said Company.

The serial notes are secured by pledge of Central New England First Mortgage Four Per Cent. Fifty Year Gold Bonds.

[fol. 25] 6. A copy of the applicant's general balance sheet as of the latest date for which such statement is available.

[fol. 26] Central New England Railway Company

General Balance Sheet, March 31, 1921

Assets

		March, 1921.	
	Investments:		
701	Investment in Road and Equipment		23,552,973.78
702	Improvements on Leased Railway Property		
703	Sinking Funds		
704	Deposits in lieu of mortgaged property sold		
705	Miscellaneous Physical Property		63,722.45
706	Investments in Affiliated Companies:		
		Pledged	Unpledged
	(A) Stocks		
	(B) Bonds		
	(C) Notes		819,781.71
	(D) Advances		108,187.86
707	Other Investments:		
	(A) Stocks		5,000.00
	(B) Bonds		12,475.83
	(C) Notes		
	(D) Advances		
	(E) Miscellaneous		
	Total Investment		24,562,142.65
	Current Assets:		
708	Cash		327,388.37
709	Demand Loans and Deposits		
710	Time Drafts and Deposits		
711	Special Deposits		20,915.71
712	Loans and Bills Receivable		
713	Traffic and Car-Service Balances Receivable		126,227.50
714	Net Balance Receivable from Agents and Conductors		22,522.62

715	Miscellaneous Accounts Receivable		811,641.98
716	Material and Supplies		863,837.23
717	Interest and Dividends Receivable		1,275.49
718	Rents Receivable		
719	Other Current Assets		1,006.63
	Total Current Assets		2,174,518.53
	Deferred Assets:		
720	Working Fund Advances		1,743.60
721	Insurance and Other Funds		8,118.00
722	Other Deferred Asset		
	U. S. Government Deferred Assets		2,291,068.52
	Total Deferred Assets		2,300,930.12
	Unadjusted Debits:		
723	Rents and Insurance Premiums Paid in Advance		1,692.72
724	Discount on Capital Stock		
725	Discount on Funded Debt		214,624.54
726	Property Abandoned Chargeable to Operating Expenses		
727	Other Unadjusted Debits		1,554,744.07
	Par Value Holdings		
728	Securities Issued or Assumed—Unpledged	$479,400.00	
729	Securities Issued or Assumed—Pledged	750,000.00	
	Total Unadjusted Debits		1,771,061.33
	Grand Total		30,808,952.63

[fol. 27] Central New England Railway Company

General Balance Sheet, March 31, 1921

Liabilities

March, 1921

Stock:

		(b1) Total book liability	(b2) Respondent's holdings included in (b1)	
751	Capital Stock	8,550,000.00	12,400.00	8,537,600.00
752	Stock liability for conversion			
753	Premium on Capital Stock (Since July 1, 1909)			
	Total Stock			8,537,600.00

Government Grants:

754	Grants in aid of Construction			7,005.42

Long-term Debt:

		(b1) Total book liability	(b2) Respondent's holdings included in (b1)	
755	Funded Debt Unmatured	15,237,000.00	1,217,000.00	14,020,000.00
756	Receiver's Certificates			
757	Non-negotiable Debt to Affiliated Companies:			
	(A) Notes			
	(B) Open Accounts			
	Total Long-Term Debt			14,020,000.00

Current Liabilities:

758	Loans and Bills Payable	
759	Traffic and Car-Service Balance Payable	
760	Audited Accounts and Wages Payable	881,309.15
761	Miscellaneous Accounts payable	33,087.30
762	Interest Matured Unpaid	5,029.00

763	Dividends Matured Unpaid	1,440.00
764	Funded Debt Matured Unpaid	
765	Unmatured Dividends Declared	
766	" Interest Accrued	145,153.94
767	" Rents Accrued	17,460.90
768	Other Current Liabilities	9,645.02
	Total Current Liabilities	1,093,205.31
	Deferred Liabilities:	
769	Liability for Provident Funds	
770	Other Deferred Liabilities	3,058.81
	U. S. Government Deferred Liabilities	3,090,545.13
	Total Deferred Liabilities	3,093,603.94
	Unadjusted Credits:	
771	Tax Liability	14,169.61
772	Premium on Funded Debt	
773	Insurance and Casualty Reserves	11,618.50
774	Operating Reserves	45,165.97
775	Accrued Depreciation-Road	214,721.00
776	" " Equipment	741,904.57
777	" " Miscellaneous Property	
778	Other Unadjusted Credits	146,454.92
	Total Unadjusted Credits	1,174,034.67
	Obligations to Leased Roads for Equipment and Personal Property	209,988.59
	Corporate Surplus:	
779	Additions to Property through Income and Surplus	10,555.02
780	Funded Debt Retired through Income and Surplus	
781	Sinking Fund Reserves	
782	Miscellaneous Fund Reserves	
783	Appropriated Surplus not Specifically Invested	

Total Appropriated Surplus

784	Profit and Loss Credit Balance	2,567,885.69
	Income Account—Current Year	95,076.99
	Total Corporate Surplus	2,673,517.73
	Grand Total	30,808,952.63

[fol. 28] 7. A copy of the applicant's income account for each of the five years next preceding the current year, and of such income account for that portion of the current year for which figures are available.

(Here follows statement marked side folio page 29)

[fol. 30] 8. If the application covers less than the entire mileage operated by the applicant, the gross and net revenues and gross and net income for the portion sought to be abandoned, allocated thereto on a mileage pro rata basis.

[fol. 31] Central New England Railway Company

Income Statement, Year 1920

	Entire line	*Portion for which operations are sought to be abandoned
Railway Operating Revenue	7,818,474 97	157,933 19
Total Railway Oper. Expenses	8,397,673 10	169,632 99
Net Revenue from Rly. Oper.	579,198 13	11,699 80
Total Taxes and Uncollectible Railway Revenue	238,061 83	4,808 85
Railway Operating Income	817,259 96	16,508 65
Non Operating Income	549,915 86	11,108 30

	December 31, 1916
Railway Operating Revenue	5,208,198.45
Total Railway Oper. Expenses	2,941,140.30
Net Revenue from Rlwy.Oper.	2,267,058.15
Total Taxes and Uncollectible Railway Revenue	190,826.48
Railway Operating Income	2,076,231.67
Non-Operating Income	197,066.39
Gross Income	2,273,298.06
Deductions from Gross Income	1,358,647.59
Dividend Appropriations of Income	470,684.00
Net Income	443,966.47

In the figures for the years 1918, 1919 and 1920, a
Government guarantees have been eliminated to make
previous years.

(A) Dividend of $286,390.00 paid out of surplus.

(B) Additional amount of $520,342.00 representing dividends for 1918 paid out of surplus.

CENTRAL NEW ENGLAND RAILWAY COMPANY

Combined Income Statement for Five Years

1916 to 1920 inclusive

and Three Months ending March 31st, 1921.

	December 31, 1916	December 31, 1917	December 31, 1918	December 31, 1919	December 31, 1920	3 Months Ending Mar.31 1921
ating Revenue	5,208,198.45	5,477,288.17	6,063,135.70	6,737,408.85	7,818,474.97	2,196,242.11
Oper. Expenses	3,141,140.30	3,618,488.41	5,411,045.07	6,191,869.15	8,397,673.10	1,571,348.62
From Rlwy.Oper.	2,267,058.15	1,858,799.76	652,110.63	545,539 70	579,198.13	624.893.49
and Uncollectible evenue	190,826.48	220,906.42	196,175.64	226,422 95	238,061.83	64,556.45
ating Income	2,076,231.67	1,637,893.34	455,934 79	339,116.75	817,259.96	560,337.04
Income	197,066.39	52,672.88	155 899 42	406,518 76	549,915.86	103,410 88
	2,273,298 06	1,690,566.22	611,834.21	745,635.51	267,344.10	663,747.92
From Gross Income	1,358 647.89	1,452,785.62	1,473,838 87	1,711,291 93	2,492,786.84	566,232.40
propriations	470 684.00	- A	-	320,342 00B	-	-
	443,966.47	237,810.60	862,004.66	1,285 998.42	2,760 130.94	97,515.52

figures for the years 1918, 1919 and 1920, all rental compensation and ment guarantees have been eliminated to make the figures comparable with ous years.

ividend of $226,200.00 paid out of surplus.

dditional amount of $320,342.00 representing ividends for 1918 paid out of surplus.

	Entire line	*Portion for which operations are sought to be abandoned
Gross Income	267,344 10	5,400 35
Deductions from Gross Income	2,492,786 84	50,354 29
Dividend Appropriations of Income	.....	.....
Net Income	2,760,130 94	55,754 64

*Allocated upon pro rata basis of mileage operated.

[fol. 32] A full explanation of the statements filed in response to the last preceding question, showing the method used, and the probable effect of continued operation upon the applicant's system earnings as a whole, with reasons for the conclusion.

[fol. 33] Central New England Railway Company

Statement of Revenue and Expenses for Operation Portion of Springfield Branch for the year 1920 Between Feeding Hills and Agawan Jct. (2.1 Miles) and Agawan Jct. and Springfield (4 Miles)

Feeding Hills and Agawan Jct.

	Revenue	Expenses
Passenger Revenue	$108 84	$
Freight Revenue	766 80	
Expenses		4,637 77
Total	875 64	4,637 77
Loss from Operation		$3,762 13

Agawan Jct. and Springfield

	Revenue	Expenses
Passenger Revenue	$207 32	$
Freight Revenue	1,603 08	
Expenses of operating our train over the B. & A. tracks including wages of Train and Engine crews, Supplies, Lubricants, etc.		8,833 84

Use of tracks & station, Springfield	15,000 00
Switching cars and handling freight, Springfield	6,504.31
Wages of Towermen, Agawan Jct.	5,433 70
Maint. and Oper. Tower #44, Agawan Jct.	705 60
Maint. of Facil. at Agawan Jct.	403 40
Loss from Operation	$35,070 45

Recapitulation

	Revenue	Expenses
Feeding Hills and Agawam Jct	$875 64	$4,637 77
Agawam Jct. & Springfield	1,810 40	36,880 85
Total	$2,686 04	$41,518 62
Total Loss from Operation		$38,832 58

General Manager advises that only that portion of track north of Feeding Hills is to be abandoned, and that trains will still operate between Tariffville and Feeding Hills. Freight originating between these points and west of Tariffville destined north will be routed via Hartford.

[fol. 34] 10. The names of all cities and incorporated villages located upon the line in question, by counties, with the approximate population of each, and the source of the information as to such population, and the names of all other railroads serving them.

The following towns are located upon the line the operation of which is proposed to be abandoned.

	Population
West Springfield, Hampden County, Mass	11,339
Agawam, Hampden County, Mass	4,555

and on the portion of the Tariffville Branch the operation of which will be continued are:

Suffield, Hartford County, Conn	3,841
East Granby, Hartford County, Conn.	797

The City of Springfield, Hampden County, Massachusetts, population 102,971, is served to some extent by said line by

means of trackage rights over the Boston & Albany Railroad between Agawam Junction and Springfield.

The population of Hampden County, according to the Massachusetts State census of 1915 (which is the source of the information as to the population of West Springfield, Agawam and Springfield) was 262,944.

Suffield and East Granby, both located in Hartford County, Connecticut, will be affected to some extent by the discontinuance of operation between Feeding Hills and Agawam Junction, in that under the present arrangement they have a direct connection into Springfield for freight movements, whereas in case of the abandonment such freight will move by way of Hartford over the New York, New Haven and Hartford Railroad. Passengers, however, will have a direct route into Springfield by way of the railroad to Feeding Hills, thence by electric line. The Eastern portion of the town of Suffield is at present served by the Suffield Branch, so-called, of the New York, New Haven and Hartford Railroad, connecting with the main line between Hartford and Springfield.

The population of Hartford County, Connecticut, according to the United States census of 1910 (which is the source of the information as to the population of Suffield and East Granby) was 250,182.

Springfield is served by the Boston & Albany Railroad Company, the Boston & Maine Railroad, and The New York, New Haven and Hartford Railroad Company; West Springfield is served by the Boston & Albany Railroad Company; a portion of Agawam is served by that part of the Tariffville Branch of the Hartford and Connecticut Western Railroad Company operation of which is not proposed [fol. 35] to be abandoned; the towns of Suffield and East Granby are served by that portion of the Tariffville Branch operation of which it is not proposed to abandon.

11. The approximate population of the whole territory tributary to the line in question, with explanation of the method by which the limits of such territory were defined.

The approximate population of contributing territory to the line in question is 17,000. A portion of the territory, including this population, is served by that part of the Tariffville Branch of the Hartford and Connecticut West-

ern Railroad operation of which is not to be abandoned, but which would not have as direct an entrance into Springfield. Any territory outside of what is mentioned above would be better served by some other railroad, and would thus fall without the territory tributary to the line in question.

12. The distance in miles from another line of railroad of each city or village named in question 10.

Each of the towns or cities mentioned in question 10 is served by one or more railroads other than the portion of the line it is proposed to abandon. Springfield is on the Boston & Albany, the Boston & Maine, and the New York, New Haven and Hartford Railroads; West Springfield is on the Boston and Albany Railroad; Agawam is a rural territory and is in part still served by that part of the Springfield (Tariffville) Branch operation of which is not proposed to be abandoned. Suffield and East Granby are served by that portion operation of which is not proposed to be abandoned.

13. The names of all railroads with which the line in question connects for interchange of traffic and the points of such connection and interchange.

The Central New England Railway Company connects with the Boston & Albany Railroad Company at Agawam Junction, having trackage rights by rental agreement from Agawam Junction to Springfield, Massachusetts, interchange being effected at Springfield with the Boston & Albany Railroad.

14. The tonnage handled by the line in question, classified by principal commodities, for each of the five years next preceding the current year, stating separately the tonnage (a) originating and destined to points on the line and (b) interchanged with connecting carriers and moving over other lines.

(Here follows statement marked side folio page 36)

[fol. 37] 15. The nature of industries located in the territory tributary to the line, such as farming, mining, lumbering, manufacturing, etc., how long established and the ex-

CENTRAL NEW ENGLAND RAILWAY COMPANY

STATEMENT SHOWING APPROXIMATE FREIGHT EARNINGS OF THAT PART OF TARIFFVILLE BRANCH BETWEEN FEEDING HILLS AND SPRINGFIELD. CALENDAR YEARS OF 1916 1917 1918, 1919, 1920 AND FIRST SIX MONTHS OF 192

		NET TONS	FREIGHT CHARGES	C.N.E.R.R.CO	BRANCH EARNINGS ON TON MILS BASIS
1916	Local	14 943	$ 22,121.10	$ 22,121.10	
	Interline	29 006	75,446.71	39 390 00	
	Total	43,949	$ 97,567 81	$ 61 511.10	$ 2,408 07
1917	Local	12,860	$ 21,849.34	$ 21 849 34	
	Interline	30,265	81,411.54	42 263 73	
	Total	43,125	$103,260 88	$ 64,113 07	$ 2,36 56
1918	Local	6,533	$ 15 059.75	$ 15 059 75	
	Interline	27,063	83,158.56	43 662 43	
	Total	33 596	$ 98,2 8.31	$ 58,722 18	$ 2 084.21
1919	Local	4 510	$ 11,265.93	$ 11,265.93	
	Interline	18,177	59,537.60	31,754.25	
	Total	22 68-	$ 70,803 53	$ 43,020.18	$ 1,505.51
1920	Local	3,54-	$ 10,775.76	$ 10,775.76	
	Interline	15,713	67,284.52	35 144.30	
		19,854	$ 78,060 28	$ 45,920.06	$ 1,854.45
6 months 1921	Local	1,416	$ 4,994.73	$ 4,994.73	
	Interline	4,347	22,183.85	$ 11,750.97	
	Total	5,763	$ 27,177.96	$ 16,745.70	$ 534.23
GRAND TOTAL		188,374	$475,088.77	$290,032.89	$10,754.05

No. C3533.

CENTRAL NEW ENGLAND RAILWAY COMPANY

ACCOUNTING DEPARTMENT — OFFICE OF AUDITOR OF PASSENGER RECEIPTS

Statement showing approximate earnings on line between Feeding Hills and Springfield for five years and six months, ended June 30-1921.

	1921*		1920		1919		1918		1917		1916	
	Fares	Rev.	Fares	Rev.	Fares	Rev.	Fares	Rev.	Fares	Rev.	Fares	Rev.
Local Tickets (Including Condrs. Fares.)	860	$199.64	1857	$381.61	2060	$390.40	1910	$362.90	3289	624.87	4351	$825.69
Excursion Tickets	-	-	-	-	-	-	164	55.76	925	314.50	1157	393.38
Interline	1	.23	6	1.30	2	.36	4	.75	1	.19	3	.57
Commutation	-	-	-	-	-	-	-	-	-	-	-	-
Excess Baggage) Storage etc.)	-	-	-	-	-	-	-	-	-	-	-	-
Milk	-	-	-	-	-	-	-	-	-	-	-	-
Mail	-	71.76	-	163.62	-	264.16	-	264.16	-	263.91	-	263.91
Total	869	$271.63	1863	$ 846.53	2062	$654.94	2078	$683.58	4215	1203.47	5511	$1484.55

* Six months

Note: In June 1917, the train service was reduced one half. In October 1918, the excursion tickets were withdrawn. On August 26.1918, the fares were increased 20%.

Approved:

A. MACDONELL,
Auditor of Revenue.

A.R.DOWN,
Auditor of Passenger Receipts.

New Haven, Conn., July 21,1921.

tent to which each such industry is dependent upon the line in question for transportation.

The industries along the line proposed to be abandoned are principally tobacco growing, manufacturing and farming, the majority of which have been established for many years; in fact, prior to the construction of the Tariffville-Springfield Branch in 1902. There being no stations discontinued by reason of this proposed abandonment, the communities and industries will be served by the same transportation lines as at present, except there will be no direct movement between Feeding Hills, Massachusetts, and Springfield, Massachusetts, over the tracks of the Central New England Railway. The passenger traffic can be handled via the street railway, and the freight traffic can be handled via Tariffville over the Central New England to Hartford, then over the New York, New Haven and Hartford Railroad to Springfield. The majority of these industries are equipped with automobile trucks or similar methods of transportation for the handling of their business and are dependent upon the railroad for transportation to a very small extent.

16. The passenger traffic handled on the line in question for each of the five years next preceding the current year, giving separately the number of local and connecting line passengers (if the latter designation is applicable) and the revenue derived from each class.

(Here follows statement marked side folio page 38)

[fol. 39] 17. If the volume of traffic, freight or passenger, or both, has diminished during recent years, any reasons which may be assigned for such decrease.

The reduction in local and interline business handled on the Tariffville Branch has resulted partly from a re-arrangement of train service but to a greater extent because of motor truck competition. Motor trucks have taken the larger part of the freight business while privately owned automobiles have taken the greater part of the passenger business, making continued operation of the line unprofitable.

18. What effort, if any, has been made to dispose of the line in question so as to insure continued operation.

No effort has been made to dispose of the line in question, as the territory served does not produce sufficient freight or passenger traffic to make it inviting to anyone to operate.

19. Opinion of counsel that the proposed abandonment is within the charter powers of the applicant.

[fol. 40] Central New England Railway Company

Office of the Vice President & General Counsel

New Haven, Conn., August 4th, 1921.

Interstate Commerce Commission, Washington, D. C.

Dear Sirs: The undersigned states that he is General Counsel of the Central New England Railway Company; that in his opinion the proposed abandonment of the operation of its line between the station at Feeding Hills and Agawam Junction, so called, in the State of Massachusetts, said line being held under lease from the Hartford and Connecticut Western Railroad Company, a Connecticut corporation, is within the charter powers of both Companies; that the said line was constructed and is operated in Massachusetts by permission of the General Court Acts and Resolves 1889, Chapter 386, amended by Acts and Resolves 1896, Chapter 121, wherein it is provided that the Hartford and Connecticut Western Railroad Company shall be subject to the general laws then or thereafter in effect; and, that said abandonment will be legal when authorized by the Interstate Commerce Commission pursuant to the provisions of the Interstate Commerce Act.

Yours very truly, E. G. Buckland, General Counsel.

[fol. 41] 20. All reasons relied upon in support of the application.

Proposed abandonment is from a point approximately 350 feet northerly of the passenger station at Feeding Hills, Massachusetts, extending a distance of approximately 1.87 miles to the end of the Branch at Agawam Junction, as indicated in red on blueprint attached. It is also intended

SPRINGFIELD TO TARIFFVILLE.

WESTWARD. C. N. E. RY.

Distance from Springfield	STATIONS.		Distance between Stations	901 Ex. Sun. 1st Class Mixed		
				A M		
0.00	*Springfield*	N	0.00	8.20	.....	.....
4.05	Agawam Jct.	N	4.05	8.33	.....	.....
6.11	Feeding Hills	D	2.06	⚑ 8.42	.....	.....
9.77	Freemans		3.66	f 8.53	.....	.....
11.62	West Suffield	D	1.85	⚑ 9.00	.....	.....
12.76	Sheldon Street		1.14	f 9.06	.....	.....
15.35	East Granby	D	2.59	⚑ 9.15	.....	.....
18.34	Tariffville	D	2.99	9.25	.....	.....
		Arrive		A M		
	Note references ☞					

TARIFFVILLE TO SPRINGFIELD.

EASTWARD. C. N. E. RY.

Distance from Tariffville	STATIONS.		Distance between Stations	900 Ex. Sun. 1st Class Mixed	
				P M	
0.00	Tariffville	D	0.00	2.15	.....
2.99	East Granby	D	2.99	⚑ 2.30	.....
5.58	Sheldon Street		2.59	f 2.40	.....
6.72	West Suffield	D	1.14	⚑ 2.49	.....
8.57	Freemans		1.85	f 3.00	.....
12.23	Feeding Hills	D	3.66	⚑ 3.25	.....
14.29	Agawam Jct.	N	2.06	3.40	.....
18.34	*Springfield*	N	4.05	3.55	.....
		Arrive		P M	
	Note references ☞				

The time shown at *Springfield* is for information only.

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to abandon operation of trains of the Central New England Railway Company between Agawam Junction and Springfield over the tracks of the Boston & Albany Railroad, a distance of approximately 4.05 miles, as indicated in yellow on blueprint attached, it now being handled under rental agreement.

There is not sufficient volume of traffic over the line proposed to be abandoned to warrant continuation of the high operating cost, including the expensive rental for the use of the Boston & Albany tracks, signal station at Agawam Junction, passenger and freight facilities at Springfield, making it essential in the interest of economical operation that the proposed abandonment be effected. Furthermore, the present service, consisting of one round trip of a combination freight and passenger train in each 24 hour period, as indicated on attached sheet extracted from time table 84, in effect June 5th, 1921, is more than sufficient to care for the passenger and freight traffic, as most of the passenger traffic is now handled by trolley cars operating between Springfield and Feeding Hills every 30 minutes, and the freight traffic can be handled via Tariffville and Hartford just as expeditiously as it is handled at present via the direct route, so that the proposed abandonment would not affect the transportation of freight of the industries located in that vicinity, nor would it have any bearing on the transportation of through freight.

When the line was constructed, it was the intention to have another route for business from the southern and middle states to central and upper portion of the New England states, but the traffic never materialized, as competitive lines retained the business.

(Here follows side folio page 42)

[fol. 43] **(Map)**

C. N. E. Ry.

Plan Showing Portion of Tariffville Branch to be Abandoned

June 2, 1921

Scale: $\frac{1}{62500}$.

Red: Leased and Operated by Central New England Railway Company to be abandoned.

Yellow: Boston & Albany Railroad Company Maine Line used under Rental Agreement.

[fol. 44] 21. A tracing of the original map or a blue print or white print of the original tracing on sheets 24″ x 56″ with plain lined margins, the inside dimensions of which shall be 23″ x 55″, drawn to a scale of 1″=200′ or 1″=400′, showing the location and route of the line affected by the proposed abandonment, with its relation, within the limits of the sheet, to other railroads and other common carriers in the same territory. Also a skeleton index or route map, drawn to a scale of not less than ¼″=1 mile on which shall be shown the line proposed to be abandoned, with its relation to other railroads or other common carriers that are within 20 miles on either side thereof and which shall be shown at any convenient place on the first sheet of the map described above, if desired, or on a separate sheet of the dimensions given above, all to be substantially in accordance with Map Order, so called, pertaining to steam railway carriers, made and entered by the Commission under date of January 12, 1914, and modified and supplemented by Valuation Orders Nos. five (5), six (6) and twenty-three (23).

[fol. 45] (Map)

Right of Way and Track Map

Central New England Ry. Co.

(Lessee from the Hartford and Connecticut Western R. R. Co.)

Tariffville Branch,

Feeding Hills to Agawam Jct., Mass.

Office of Designing Engineer, New Haven, Conn.

May 7, 1921

Scale: 1"= 200'.

[fol. 46] Profile

Central New England Ry. Co.

(Lessee from the Hartford and Connecticut Western R. R. Co.)

Tariffville Branch

Feeding Hills to Agawam Jct., Mass.

Office of Designing Engineer, New Haven, Conn.

May 7, 1921

Scales: Hor. 1"=400'; vert. 1"=20'.

[fol. 47] Verification

STATE OF CONNECTICUT,
County of New Haven, ss:

C. L. Bardo makes oath and says that he is the President of Central New England Railway Company, applicant herein; that he has been authorized by proper corporate action on the part of said applicant to verify and file with the Interstate Commerce Commission the foregoing return

to questionnaire of said Commission in respect of the application in Finance Docket No. 1479; that he has carefully examined all of the statements referred to in said return and the exhibits attached thereto and made a part thereof; that he has knowledge of the matters set forth in such return and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information and belief.

C. L. Bardo.

Subscribed and sworn to before me, a Notary Public in and for the State and County above named, this 4th day of August, 1921. Edmund J. Moore. My commission expires February 1st, 1925.

[fol. 48] I, James E. Welch, depose and say that I am advertising manager for The Republican and The Daily News newspapers published by The Republican in the city of Springfield Masachusetts, and that I caused to be published in the June 24, July 1 and July 8, 1921 editions of The Republican an advertisement for The Central New England Railroad Co. and that true copy of said is attached herewith.

J. E. Welch.

Commonwealth of Mass.,
County of Hampden, ss:

Then, on this 14th day of July A. D. 1921 personally appeared before me the above named James E. Welch and made oath that the foregoing affidavit by him subscribed is true.

Allen G. Russell, Notary Public. Com. Expires 2/11/1927.

Notice

Central New England Railway Company hereby gives notice that on the 14th day of June, 1921, it filed with the Interstate Commerce Commission at Washington, its application for a certificate of public convenience and necessity to abandon a branch line of railroad in Hampden County, Massachusetts.

Pursuant to the requirements of the commission, said application is now published, as follows:

Before the Interstate Commerce Commission

Application of Central New England Railway Company for a Certificate of Public Convenience and Necessity Under Paragraphs 18 to 22, Inclusive, of Section 1 of the Interstate Commerce Act, as Amended by the Transportation Act, 1920.

Central New England Railway Company, a corporation organized under the laws of the State of New York, makes application to the Interstate Commerce Commission for a certificate of public convenience and necessity under Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, permitting the abandonment of operation of its line betwen Feeding Hills, Massachusetts, and Agawam Junction, Masachusetts, and states:

1. The postoffice address of applicant and of C. L. Bardo, President; A. E. Clark, Secretary, and E. G. Buckland, General Counsel, is 71 Meadow Street, New Haven, Connecticut.

2. The making and filing of this application has been approved at a meeting of the Board of Directors on May 3rd, 1921, at New Haven, Connecticut.

3. That applicant operates a branch line from Tariffville, Connecticut, to a junction with the Boston & Albany Railroad known as Agawam Junction, near the border line between the towns of Agawam, and West Springfield, Massachusetts and proposes to abandon the operation of that portion of said branch between the station at Feeding Hills in the town of Agawam and said junction, all said portion of line being in Hampden County, Massachusetts, and, in addition to abandon the operation of its trains between said junction and Springfield, Massachusetts, over the tracks of the Boston & Albany Railroad.

4. Applicant's lines are operated as a part of the system of The New York, New Haven and Hartford Railroad Company, and all freight on said Tariffville branch destined to and from Springfield, and beyond can be handled over applicant's main line and the New York, New Haven and Hartford Railroad via Hartford, Connecticut. Passenger service is furnished betwen Feeding Hills and Springfield by an electric line.

5. Applicant desires such hearing as the Commission may deem necessary.

Central New England Railway Company, by
(Signed) C. L. Bardo, President.

Verification

STATE OF CONNECTICUT,
County of New Haven, ss:

C. L. Bardo makes oath and says that he is the President of Central New England Railway Company; that he has carefully examined each and all statements contained in the foregoing application; that they are true and correct to the best of his knowledge and belief; that said application is made with the approval and at the direction of the Board of Directors of the applicant, as appears by the minutes of said Board of May 3rd, 1921; and that he has been authorized by said Board to make said applications.

(Signed) C. L. Bardo.

Subscribed and sworn to before me, a Notary Public in and for the State and County above named, this 10th day of May, 1921. (Signed) Edmund J. Moore. My commission expires February 1st, 1925. (Seal.)

[fol. 49] Received Sep. 13, 1921, Bureau of Dockets.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 1479

In the Matter of the Application of THE CENTRAL NEW England Railway Company for a Certificate of Public Convenience and Necessity

Submitted September 3, 1921. Decided September 8, 1921

Certificate issued authorizing the abandonment of a line of railroad in Hampden county, Mass.

E. G. Buckland for applicant.

Report of the Commission

Division 4, Commissioners Daniels and Potter

By DIVISION 4:

The Central New England Railway Company, a carrier by railroad subject to the interstate commerce act, on Jun

15, 1921, filed an application for a certificate that the present and future public convenience and necessity permit the abandonment of a line of the applicant's railroad extending from the station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Hampden county, Mass., a distance of approximately 1.87 miles. No representations were made by the authorities of the state of Massachusetts either for or against the granting of the application. The case was submitted without formal hearing.

The applicant owns and operates about 300 miles of track in its entire system. Its trains enter Springfield, a city of more than 100,000 inhabitants, by using 4.05 miles of track of the Boston & Albany railroad. Under the trackage agree-[fol. 50] ment the applicant is to pay the Boston & Albany Railroad Company $15,000 a year for the right to operate over this track not more than 3 freight trains of 30 cars each and 3 passenger trains daily. This agreement expires August 30, 1940.

The applicant proposes to abandon about 1.87 miles of track extending from Agawam to its connection with the Boston & Albany. The traffic is very light over this line; it is handled in one mixed train a day at the present time and it is not likely to increase in the near future. From Agawam an electric line runs directly into Springfield, hauling passengers and light freight. For the year 1920 the revenue derived from the line proposed to be abandoned was $2,686.04, and the operating expenses were $41,518.62, resulting in an operating loss of $38,832.58.

Upon the facts presented we find that the present and future public convenience and necessity permit the abandonment of the line in question. A certificate to that effect will accordingly be issued.

[fol. 51] Certificate

At a Session of the Interstate Commerce Commission, Division 4, Held at Its Office in Washington, D. C., on the 8th Day of September, A. D. 1921

Finance Docket No. 1479

In the Matter of the Application of The Central New England Railway Company for a Certificate of Public Convenience and Necessity.

Investigation of the matters and things involved in this proceeding having been had, and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity permit the abandonment by the Central New England Railway Company of its line of railroad extending from the station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Masachusetts, as described in the application and report aforesaid:

It is ordered, That said Central New England Railway Company be, and it is hereby, authorized to abandon said line of railroad;

It is further ordered, That said Central New England Railway Company, when filing schedules canceling tariffs applicable to said line of railroad, shall in such schedules make specific reference to this certificate by title, date and docket number.

By the Commission, Division 4.

George B. McGinty, Secretary.

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Supreme Court of the United States.

OCTOBER TERM, 1928.

No.

CENTRAL NEW ENGLAND RAILWAY COMPANY,
PETITIONER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF SUFFOLK AND COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Justices of the Supreme Court of the United States:

Your petitioner, Central New England Railway Company, respectfully represents the following facts:

First: On October 25, 1899, your petitioner, Central New England Railway Company, entered into a contract (Exhibit 3) with The Boston & Albany Railroad Company. By two mesne assignments the contract was transferred to New York Central Railroad Company.

Second: The contract provided in chief that The Boston & Albany Railroad Company, from and after the opening of a branch line then in process of construction by your petitioner until August 30, 1940, should license and permit, subject to the Albany Company's control and government of the trains, your petitioner to pass over with its trains about four miles of main-line track of The Boston & Albany Railroad into Springfield, Massachusetts, your petitioner paying therefor fifteen thousand dollars ($15,000) a year, with a provision for increased payment if the number of trains exceeded a specified number.

Third: Your petitioner constructed the branch line referred to from its lines in the south through Feeding Hills

Connecticut, to a point of connection on The Boston & Albany Railroad known as Agawam Junction, about four miles west of Springfield. This branch line was the only physical connection between your petitioner's rails and those of The Boston & Albany. The only way in which your petitioner could get its trains onto the tracks covered by the contract was over this line from the south through Feeding Hills. The contract gave your petitioner no right to operate independently on Boston & Albany rails, and there was no station between Agawam Junction and Springfield. The only way in which your petitioner could operate under the contract was by coming from the south over this branch line through Feeding Hills and Agawam Junction to Springfield. Whatever rights were received by your petitioner under the contract were entirely dependent upon and ancillary to such operation of its trains from the south through Feeding Hills. Failure to operate over this branch north of Feeding Hills necessarily involved a termination of the contract on which suit is brought because there could then be no operation by your petitioner over the Albany's tracks between Agawam Junction and Springfield.

Fourth: On September 15, 1902, your petitioner began the regular operation of its trains over this branch and into Springfield over the tracks of The Boston & Albany Railroad. This operation by your petitioner continued with a gradually decreasing number of trains operated until December 15, 1921. Payments at the annual rate of $15,000 a year were made by your petitioner for the period from September 15, 1902, to December 15, 1921. Up to the last-named date all charges rendered against your petitioner under the contract have been paid.

Fifth: In May, 1921, your petitioner applied (Exhibit 32) to the Interstate Commerce Commission, under paragraphs 18 to 22, inclusive, of section 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920 (41 U.S. Stats. at Large 474), for a certificate of public convenience

and necessity covering the abandonment of its operation over the above-mentioned branch line and The Boston & Albany tracks from Feeding Hills into Springfield. All the statutory requirements regarding the filing, notification and service of this application were fully complied with, and on August 5, 1921, your petitioner filed answers to the questionnaire issued by the Interstate Commerce Commission giving all the facts covering the operation of the branch to be abandoned.

On September 8, 1921, the Interstate Commerce Commission issued on the application of your petitioner a certificate of public convenience and necessity in which it was *certified* that "the present and future public convenience and necessity permit the abandonment by the Central New England Railway Company of its line of railroad extending from the station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad," and "*Ordered* that said Central New England Railway Company be, and it is hereby authorized to abandon said line of railroad."

Sixth: On November 7, 1921, your petitioner informed The Boston & Albany Railroad that by virtue of the above certificate of the Interstate Commerce Commission it would, effective December 15, 1921, discontinue operation of its lines north of Feeding Hills, and between there and Agawam Junction, and cease payments under the contract of October 25, 1899.

Seventh: On December 15, 1921, your petitioner, in pursuance of the above order of the Interstate Commerce Commission, abandoned its lines north of Feeding Hills and ceased the operation of trains over the branch line constructed under the contract and into Springfield. After the abandonment of this line, which was part of that constructed under the contract as set out in paragraph third of this petition, it was physically impossible for your petitioner to operate under the contract. Termination of the

contract, on which suit is brought, was necessarily incidental to your petitioner's carrying out the Commission's order, and since that date no further contract payments have been made by your petitioner.

Eighth: On April 5, 1922, action for breach of contract was begun against your petitioner in the Superior Court for Suffolk County in the Commonwealth of Massachusetts.

Ninth: On or about February 23, 1927, said Superior Court denied the efficacy of the amended Interstate Commerce Act and the certificate of the Commission issued thereunder as a defense to the action, and a verdict of $169,012.72 was entered against your petitioner.

Tenth: On or about February 20, 1928, your petitioner's substitute bill of exceptions to the rulings of said Superior Court was filed in the Supreme Judicial Court for the Commonwealth of Massachusetts.

Eleventh: On or about June 14, 1928, said Supreme Judicial Court, the highest court of the Commonwealth in which a decision could be had, handed down an opinion and rescript dismissing all your petitioner's exceptions. The opinion was based on the theory that by paragraphs 18 to 21 of section 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920 (41 U.S. Stats. 474), Congress had authorized the Interstate Commerce Commission to sanction the abandonment of a contractual obligation such as existed in this case, but that in this particular case the certificate and order of the Commission were not a defense to the action because the court could not find clearly that the Commission intended to deprive The Boston & Albany Railroad Company, or its successor, of its rights under the agreement with your petitioner (see 8th and 9th paragraphs of Opinion).

Twelfth: On June 20, 1928, the petitioner applied to the Chief Justice of said Supreme Judicial Court for a reargument of the federal question concerning the interpretation and efficacy of the Interstate Commerce Act as amended.

This application was based on the ground that the opinion of said Supreme Court was erroneous in attempting to state the intention of the Interstate Commerce Commission on a matter in which such intention properly played no part. This application set out clearly that private contracts were affected by force of the Act of Congress, and that the intention of the Commission as to any particular obligation was quite immaterial. The application was denied on June 29, 1928.

Thirteenth: On July 30, 1928, a final judgment of $183,606.96 was entered against your petitioner by said Superior Court for Suffolk County.

Fourteenth: Your petitioner is advised and alleges that said judgment of the Superior Court as affirmed by the Supreme Judicial Court is erroneous, and should be reviewed by this court—

1. Because the judgment and opinion of the Supreme Judicial Court dismissing your petitioner's exceptions fail to recognize the validity as a defense to the action of the certificate and order of the Interstate Commerce Commission, issued, in the proceeding numbered 1749 on its finance docket, under paragraphs 18 to 22 of section 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920 (41 U.S. Stats. at Large 474).

2. Because the judgment as affirmed by the decision dismissing your petitioner's exceptions denies entirely to your petitioner the right, claimed by it under the amended Interstate Commerce Act (41 U.S. Stats. at Large 474) as applied, to cease operation and further payments under the contract sued on with impunity.

3. Because the judgment as affirmed by the decision dismissing your petitioner's exceptions denies to your petitioner the validity of the amended Interstate Commerce Act (41 U.S. Stats. 474) as a defense to an action for damages arising from action covered by a certificate and order issued by the Interstate Commerce Commission.

4. Because the judgment as shown by the opinion of the Supreme Judicial Court dismissing your petitioner's exceptions proceeds on the theory that the certificate and order of the Interstate Commerce Commission is invalid as a defense to the action because the Commission did not affirmatively intend to abrogate the obligation on which suit was brought, whereas the effect on private contracts of orders issued by the Commission under paragraphs 18 to 22 of section 1 of the amended Act is a question depending, not upon the Commission's intention as to the particular contract, but upon the legal interpretation of the Act of Congress.

5. Because the judgment as shown by the opinion of the Supreme Judicial Court dismissing your petitioner's exceptions proceeds on the theory that the certificate and order of the Interstate Commerce Commission is invalid as a defense to the action, on the ground that the Commission did not affirmatively intend to abrogate the obligation sued on, whereas the Commission has properly pointed out (131 I.C.C. 421) that it has no power under paragraphs 18 to 22 of section 1 of the amended Interstate Commerce Act to authorize, as such, the abrogation of contract obligations.

6. Because the judgment, as shown by the opinion of the Supreme Judicial Court dismissing your petitioner's exceptions, relies upon the alleged fact that the Interstate Commerce Commission did not intend to adjudicate that the annual $15,000 payment was an operating charge of your petitioner, whereas the accounting nature of said annual payments is immaterial on the question as to the legal effect of the action of Congress and the Interstate Commerce Commission and said annual payments were properly operating charges of your petitioner and have been so adjudicated by the Interstate Commerce Commission.

7. Because the judgment as affirmed by the opinion of the Supreme Judicial Court dismissing your petitioner's

exceptions renders ineffective Congressional legislation and action thereunder, which was passed for the purpose of relieving burdens on the interstate operations of interstate common carriers.

8. Because the denials of your petitioner's motions to dismiss on jurisdictional grounds deny to your petitioner the rights given by sections 207 and 208 of the amended Judicial Code (U.S. Code Ann. title 28, secs. 41 (28), 46; 36 U.S. Stats. at Large 1148, and 38 U.S. Stats. at Large 219), although the inevitable effect of said denials and judgment is to limit the application of an order of the Interstate Commerce Commission, suspend the operation of the order as against the agreement sued on, and annul its effect to a certain extent.

9. Because the questions presented are federal questions of public importance and of general interest to the interstate railroads of the country, not heretofore determined by this court, which have been decided by the state courts of Massachusetts in a way not in accord with the law and applicable decisions of this court. See—

Dayton-Goose Creek R.R. v. *United States*, 263 U.S. 456.

New England Divisions Case, 261 U.S. 184.

Colorado v. *United States*, 271 U.S. 153.

Louisville & Nashville R.R. v. *Mottley*, 219 U.S. 467.

Railroad Comm. of Texas v. *Eastern Texas R.R.*, 258 U.S. 204.

Fifteenth: Your petitioner makes a part of this petition the reported decisions herein referred to and submits as an exhibit herewith a certified copy of the record of the trial of said case and of the opinion of the Supreme Judicial Court and a brief in support of this petition.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this

Honorable Court, directed to the Honorable the Judges of the Superior Court in and for the County of Suffolk and Commonwealth of Massachusetts, requiring said Superior Court to certify and send to this Honorable Court on a day certain to be therein designated a transcript of the record and of the proceedings (or such parts thereof as counsel may stipulate may be useful in this Court) in said Superior Court in the matter entitled therein *Boston & Albany Railroad Company, Assignor for the Benefit of the New York Central Railroad Company*, v. *Central New England Railway Company*, No. 140,676, to the end that said matter may be reviewed and determined by this Honorable Court as provided by law, and that your petitioner may have such other and further relief or remedy and processes in the premises as to this Honorable Court may seem meet.

CENTRAL NEW ENGLAND RAILWAY COMPANY,
By JOHN L. HALL,
MARCIEN JENCKES,
Counsel.

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

I, John L. Hall, being duly sworn, say that I am one of counsel for Central New England Railway Company, the petitioner; that I have read the foregoing petition and am familiar with the matters therein set forth; and that the allegations thereof are true as I verily believe.

JOHN L. HALL.

Subscribed and sworn to before me this 27th day of October, 1928.

RICHARD WAIT,
Notary Public.

My commission expires April 11, 1935.

Supreme Court of the United States.

OCTOBER TERM, 1928.

No.

CENTRAL NEW ENGLAND RAILWAY COMPANY,
PETITIONER.

BRIEF FOR THE PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This is a petition for a writ of certiorari to review the proceedings and judgment of the Superior Court of Massachusetts, exceptions to which by the petitioner were dismissed by the Supreme Judicial Court of the Commonwealth. The judgment was rendered against the petitioner for breach of contract. The federal questions presented are raised by the certificate and order of the Interstate Commerce Commission, which the petitioner relied on as a defense to the action brought.

The suit was brought by the New York Central Railroad Company for breach of a contract (Exhibit 3) dated October 25, 1899. This contract was executed as a result of a previous agreement, dated May 9, 1898 (Exhibit 28), between The Boston & Albany Railroad Company, the Philadelphia, Reading & New England Railroad Company, its reorganization committee, and The Hartford & Connecticut Western Railroad Company. This earlier agreement contemplated the organization of your petitioner and the construction of a branch line to connect with the lines of The Boston & Albany upon the location and construction of

which your petitioner and The Boston & Albany Railroad Company were to make the contract sued on. The branch line was to be constructed from the south through Feeding Hills, Connecticut, to a point of connection on The Boston & Albany known as Agawam Junction, a distance of four miles from the City of Springfield. The petitioner was to run its trains into Springfield over the tracks of The Boston & Albany under the license provided for by the contract sued on. The branch line was to be the only physical connection between the rails of the petitioner and those of The Boston & Albany. The only way that the petitioner could use The Boston & Albany tracks covered by the contract was by coming from the south through Feeding Hills over this new branch line.

The petitioner received by the contract no right to run any trains over the line of The Boston & Albany between the connection point and Springfield. There were no stations on the Central New England between Feeding Hills and Springfield. The petitioner's only right was to pass over with its trains about four miles of Boston & Albany tracks. Operation by the petitioner was therefore *entirely dependent* upon and ancillary to the operation of its trains from the south through Feeding Hills to the point of connection.

Within a month after the execution of the second contract (Exhibit 3) The Boston & Albany Railroad had been leased, by Exhibit 1, to the corporate predecessor of the New York Central Railroad Company.

The branch line was completed in 1902 and was operated for approximately nineteen years, until revenue and expenses for the operation from Feeding Hills into Springfield showed a loss for the year 1920 alone of $38,832.58 (Exhibit 22).

The Interstate Commerce Commission then issued an order authorizing the abandonment by the petitioner of its operation over this branch line, and the petitioner, on De-

cember 15, 1921, ceased operation in accordance with the order of the Commission. It was the contention of the plaintiff at the trial that, despite the petitioner's cessation of operation, the plaintiff should receive for the subsequent years the $15,000 specified in the contract. This contention was based on the ground that the cost to the plaintiff of furnishing the facilities provided for by the contract was nothing. The petitioner has been held liable to pay to that plaintiff a sum equivalent to over $10,000 a year for the named period. This was so even though the Interstate Commerce Commission had issued its order authorizing the abandonment of the branch line, the use of which was essential to the passing of Central New England trains over the tracks of The Boston & Albany.

The physical situation at Agawam Junction is well illustrated by maps contained in Exhibit 32 and by Exhibits 23, 24, 25 and 35. It is about four miles from Agawam Junction to Springfield.

The layout at Springfield is well illustrated by Exhibits 22, 24 and 29. It is described in the record submitted herewith.

The New York Central Railroad Company was the original plaintiff, basing its rights upon two assignments:

1. That of The Boston & Albany Railroad Company to the New York Central & Hudson River Railroad Company, dated November 15, 1899, contained in the lease of The Boston & Albany Railroad to the New York Company, and—

2. That of the New York Central & Hudson River Railroad Company to it contained in the consolidation agreement, Exhibit 2.

By amendment allowed June 19, 1928, after the rescript from the Supreme Judicial Court, The Boston & Albany Railroad Company, assignor for the benefit of the New York Central Railroad Company, became the plaintiff.

The contract on which the suit was brought contains a single whereas clause referring to Exhibit 28 and the construction of the line to connect with The Boston & Albany. The claim against your petitioner is for breach of the obligation contained in paragraph 1 of the contract, Exhibit 3. This paragraph provides generally that from and after the opening of the branch line for the passage of regular trains until the 30th day of August, 1940, The Boston & Albany Railroad Company was to "license and permit, subject to the regulation and control" by itself of the train movement, the petitioner and its successors "to pass with trains and locomotives over the line of the Albany Company between the point of connection west of the Connecticut River and the yard and engine houses at West Springfield in each direction, and farther for passenger trains across the bridge over the Connecticut River and into the Union Station at Springfield, with the right to use in connection with such trains all water stations and other facilities necessary for the accommodation of such trains and the traffic to be transported by them," the petitioner "paying to the plaintiff therefor fifteen thousand dollars ($15,000) per annum in equal quarterly payments on the first days of January, April, July and October of each year, the first payment to be made upon the first quarterly period next succeeding the opening of said branch line for the passage of regular trains."

The first paragraph also provided for proportionately increased payments if the number of trains exceeded a specified number and for payment to be made by your petitioner if it used the Albany's water stations or engine stalls.

The second paragraph of the body of the agreement provided rates for the transfer of freight cars.

The third paragraph required the Albany Company to sell tickets, handle baggage and take care of passenger

trains and transfer through passenger cars to connecting lines.

The fourth paragraph provided for your petitioner to build and maintain an interlocking tower at the junction of its road and the Albany.

The fifth paragraph dealt with the ascertainment and apportionment of responsibility in case of accident or loss.

The sixth paragraph provided that your petitioner should make payments required by the contract in accordance with the terms thereof.

The seventh and last paragraph dealt with the transfer of the contract rights and the effect of bankruptcy, etc.

Operation by the petitioner over the branch line and into Springfield began on September 15, 1902, and continued with a gradually decreasing number of trains operated until December 15, 1921. Payments were made by your petitioner for all charges billed against it under the contract up to and including December 15, 1921. The suit brought, therefore, related solely to the future.

For the five years ending December 31, 1920, the business of the petitioner resulted in a total loss of $4,226,356.95, and the revenue and expenses for the operation from Feeding Hills into Springfield showed a total loss for 1920 from operating the branch line of $38,832.58 (Exhibit 32).

In May, 1921, the petitioner filed under section 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920, 41 Stats. at Large 474, an application with the Interstate Commerce Commission for a certificate that the present and future public convenience and necessity permit the abandonment of its line between Feeding Hills and Agawam Junction (Exhibit 32). The required statutory notice of the petition and proceeding was given, and in August the answers to a questionnaire giving the full history of the petitioner's line and its operation were filed (Exhibit 2). In September the Interstate Commerce

Commission issued its certificate and order authorizing the abandonment (Exhibit A, Exhibit 32).

By letter dated November 9, 1921 (Exhibit 7, Record, p. 7), the plaintiff was informed that the defendant, by virtue of Exhibit A, proposed to discontinue operation into Springfield and to cease to use the privileges of Exhibit 3. On December 14, 1921, the defendant operated its last train out of Springfield. The petitioner's line from Feeding Hills to Agawam Junction was abandoned for service. The physical connection at Agawam Junction was severed. It became legally and physically impossible for the petitioner to operate its trains over the tracks of The Boston & Albany into Springfield.

The action to recover damages at the rate of $15,000 a year for more than eighteen years was begun in April, 1922. At the trial the petitioner claimed that the plaintiff had suffered no damages by reason of the cessation of operation because the cost to the original plaintiff, if the petitioner operated the full contract allowance of trains, would be as much or more than $15,000 a year. The original plaintiff, on the other hand, contended that it should be allowed to recover the full $15,000 a year without deduction because the petitioner had entirely repudiated the contract and the cost to the plaintiff of furnishing the facilities was nothing. Considerable testimony from eye-witnesses and experts was produced by both sides, on the basis of which the jury rendered a verdict of $169,012.72, which represents about $10,500 per annum from December 15, 1921, to August 30, 1940, discounted at 6%.

The petitioner by answer and argument in both the Superior and Supreme Judicial Courts of Massachusetts contended that the Interstate Commerce Act and the order of the Commission thereunder were a defense to the action. This claim of right or immunity set up under a federal statute has been denied to the petitioner in a decision by the highest court of the state in which a decision could

be had. The federal question thus raised is the principal question sought to be reviewed in this Court.

The further question of jurisdiction is also raised because both at the beginning and at the end of the trial the petitioner challenged the court's jurisdiction of the subject-matter of the case.

Statutes Involved in the Case.

Interstate Commerce Act, as amended by the Transportation Act of February 28, 1920, 41 Stat. at Large 456, 477, sec. 1, pars. 18 to 20, inclusive:

> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.
>
> "(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon

receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints of the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly

authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Section 207 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1148, Act of June 18, 1910, c. 309, sec. 1; 36 Stat. 539, being United States Comp. Stat. 1916, sec. 993:

"The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

"Third. Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

"Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled 'An Act to regulate commerce', approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

"Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

"The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes."

Section 208 of the Judicial Code, Act of March 3, 1911, 36 Stat. 1148, Act of June 18, 1910, c. 309, sec. 1; 36 Stat. 539, being United States Comp. Stat. 1916, sec. 997:

"Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit."

Act of October 22, 1913, c. 32, 38 U.S. Stat. at Large 219, being United States Comp. Stat. 1916, sec. 992:

"The Commerce Court, created and established by the Act entitled 'An Act to create a Commerce Court and to amend the Act entitled 'An Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes', approved June eighteenth, nineteen hundred and ten, is abolished from and after December

thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed."

Argument.

Outline.

1. The case is a proper one to be reviewed by this Court.
2. The judgment of the Massachusetts courts should be reversed.

   a. The Interstate Commerce Act and the certificate and order of the Commission issued thereunder necessarily protect the defendant from any liability in this action.

   b. There was no jurisdiction in the Massachusetts courts to hear the cause.

1. The Case is a Proper One to be Reviewed by This Court.

The petitioner, by claim and argument seasonably made before both Superior and Supreme Judicial Courts in Massachusetts, has contended that it should be protected from liability in this suit by the Interstate Commerce Act as amended by the Transportation Act of 1920, and the

certificate and order of the Interstate Commerce Commission issued under paragraphs 18 to 22 of section 1 of that statute. The question depends upon the scope and effect to be given to the above-mentioned paragraphs of the amended Interstate Commerce Act. It is a federal question of considerable substance and importance which has not been decided by this Court.

The claim of a federal right is based upon the paramount power of Congress to legislate concerning interstate commerce even to the extent of cutting across or abrogating private contracts. The Supreme Judicial Court of Massachusetts, on conclusive authority, admitted this power and assumed that Congress, by the Transportation Act, authorized the Commission to sanction the abandonment by an interstate carrier of a contractual obligation, such as existed in the case before it, with impunity (see eighth paragraph of Supreme Court opinion).

The Supreme Judicial Court of Massachusetts, however, denied the petitioner's contention on the ground that the Interstate Commerce Commission did not *intend* to deprive The Boston & Albany Railroad Company, or its successor, of its rights under the agreement with the petitioner (see ninth paragraph of Supreme Court opinion).

This reasoning, it is submitted, wholly misconstrues the situation, because the paragraphs 18 to 22 of section 1 of the Interstate Commerce Act do not expressly give to the Commission any particular power over obligations. Under those paragraphs the Commission deals with abandonment of lines of railroad, so that the *intention* of the Commission as to any particular obligation is immaterial. The effect on private contracts of the Commission's action is by force of the intent of Congress as shown by the legislation, and not by force of the Commission's primary intention to affect the contract.

Congress, by the paragraphs 18 to 22, delegated to the Commission the duty of determining when the public con-

venience and necessity permitted or required certain things, and of issuing a certificate to that effect. This delegation to the Commission was of a special nature. The certificate and order of the Commission may state the time or place of efficacy, but the result on private contracts is the result of the intent of Congress as set out in the statute. The legal effect of action taken by the Commission ensues, not by force of the Commission's order, but by force of the Act of Congress.

It is submitted, therefore, that the Supreme Judicial Court of Massachusetts has misinterpreted the Interstate Commerce Act as amended. It has decided a federal question of substance on an improper and inadequate interpretation of a federal statute, and, as shown in the second section of this brief, the result reached is not in accord with applicable decisions of this Court.

It is of no moment in this petition that the federal right was not denied in terms by the state courts, for it is clear that the state courts necessarily denied the federal right in the judgment rendered, and that is a sufficient denial for this Court to take jurisdiction by writ of certiorari. (Sec. 237 (*b*) of the Judicial Code as amended; U.S. Code Ann. title 28, § 344 (*b*). *St. Louis Iron Mt. & Southern* v. *Starbird*, 243 U.S. 592. See also *Mellen* v. *O'Neil*, 275 U.S. 212.)

The case does not draw in question the constitutional validity of the federal statutes involved, so that it is not a case in which an appeal could be allowed.

It is therefore a proper case for review in this Court on a writ of certiorari, because claims of right or privilege made under federal statutes especially set up and claimed by your petitioner have been effectively denied to your petitioner by the highest court of the Commonwealth of Massachusetts in which a decision could be had.

2. The Judgment of the Massachusetts Courts should be Reversed.

a. The amended Interstate Commerce Act and the certificate and order of the Commission issued thereunder protect the defendant from any liability in this action.

The completeness of the constitutional grant to Congress of power over interstate commerce and contracts involving it has never been questioned. It may even be used to prohibit. (*United States* v. *The William*, 28 Fed. Cases, 614, where embargo laws of 1807 and 1808 were upheld. *The Lottery Cases*, 188 U.S. 121.) Certainly any contract dealing with interstate commerce is subject to an infirmity that Congress may legislate so as to alter that contract. Such legislation is paramount in its field and cuts across public or private arrangements of any kind.

Addyston Pipe & Steel Co. v. *United States*, 176 U.S. 211.

Louisville & Nashville R.R. v. *Mottley*, 219 U.S. 467.

Union Bridge Co. v. *United States*, 204 U.S. 364, 399, 400.

Minnesota Rate Cases, 230 U.S. 352.

New York v. *United States*, 257 U.S. 591, 601.

New England Divisions Case, 261 U.S. 184.

Dayton Goose Creek R.R. v. *United States*, 263 U.S. 456.

The Transportation Act of 1920 (41 U.S. Stats. 456), amending the Interstate Commerce Act, was an exercise of this Congressional power which introduced into federal legislation a new railroad policy of developing and ensuring an adequate national transportation system.

New England Divisions Case, 261 U.S. 185, at 189.

In the case at bar the petitioner was given a certificate and order of the Interstate Commerce Commission specifically authorizing the abandonment of a line of railroad. No one ever questioned but that the abandonment of that railroad necessarily involved the cessation of the petitioner's operation into Springfield and the use of the tracks covered by the contract sued on. The contract gave the petitioner no right to operation independent from service from the south over the abandoned line. The contract was premised upon the operation of that line. The whole situation was before the Commission. After the abandonment it was *physically impossible* for the petitioner to operate into Springfield under the contract. The breach of contract for which it is sought to hold the petitioner liable was necessarily incident to the abandonment authorized.

The certificate and order of the Interstate Commerce Commission upon which the petitioner relied in ceasing its operation into Springfield, Massachusetts, were issued under paragraphs 18 to 22 of section 1 of the amended Interstate Commerce Act. In a proceeding under these sections the Commission acts in the interests of interstate operations. Congress delegated to the Commission the duty of determining when public convenience and necessity permitted certain things and of issuing or denying a certificate to that effect. The Commission exercises the delegated judgment of Congress as to whether or not there is occasion for legislative action. The delegation is of a limited and special nature. It is of legislative, not judicial, power. The Commission's action may state the time or place of efficacy, but the result on private or public obligations is the result of the Act of Congress. The Commission's delegated judgment being exercised and action taken by issuance of an order, the effect of the order is to be determined by the provisions of the federal legislation, not with reference to the Commission's specific intent, nor

according to a court's view of the benefit or benefits of the situation.

Colorado v. *United States*, 271 U.S. 153, at 167.
Houston & Texas Ry. v. *United States*, 234 U.S. 342.
Union Bridge Co. v. *United States*, 204 U.S. 364.

The Commission, by section 20, has the power to attach conditions to orders issued on applications for certificates and orders of abandonment. Such conditions may properly take care of persons, private or public, who object to the granting of an order.

See *Control of Hereford Ry.*, 99 I.C.C. 7.

This power to impose conditions and the legislative nature of the Commission's order both show that the place for any objecting party to be heard is before the Commission or in the federal courts, as provided by sections 207 and 208 of the Judicial Code (see sec. (*b*) of this part of this brief). The issuance of an unconditional order by the Commission leaves parties affected no remedy but to seek to attack the order in a proper forum with jurisdiction.

The legislative nature of the Commission's order also shows the fallacy of the action of the Supreme Judicial Court of Massachusetts (see tenth paragraph of Supreme Court opinion) in attempting to support its conclusion as to the Commission's intention by relying on the facts that the plaintiff had not been made a party to the proceedings before the Commission and that the case was submitted to the Commission "without a formal hearing." Despite the lack of any requirement of notice to parties affected by legislation, there were provisions in the Transportation Act as to constructive notice by publication. *The petitioner fully complied with all of the statutory provisions as to notice.* There was therefore no flaw in the proceedings before the Commission.

And, further, the Supreme Judicial Court of Massachusetts erred in suggesting (see tenth to twelfth paragraphs of the Supreme Court opinion) that the Interstate Commerce Commission did not intend to rule that the $15,000 annual payment was an operating charge, because—

(*a*) The accounting nature of the $15,000 contract charge is entirely immaterial to the determination of the principal question as to the legal effect, on the contract in suit, of the Transportation Act and action thereunder.

(*b*) The Interstate Commerce Commission has determined that the payment is an operating, not a fixed, charge.

(*c*) Whatever name may be given to the item does not affect the prime circumstances that the wherewithal to pay it comes from the operating revenues of the petitioner, and the continuation of those payments or the payment of the judgment rendered against the petitioner would be a certain drain of that amount upon the petitioner's resources and just the sort of a burden on its interstate operations as Congress intended to avoid.

Considerations as to the advisability of the Commission's action are quite immaterial in determining the legal effect of the Commission's order. The Commission has no right to consider the expenditures of the applicant except as one factor in determining the underlying question, namely, whether the operation of the branch was a burden on the interstate operations of the petitioner. (*Application of Chicago, Rock Island & Pacific*, 131 I.C.C. 421.) Any consideration by the court of the amount or nature of losses involved in the proposed abandonment is therefore immaterial. Such matter is only for the Commission in determining whether or not a certificate of public convenience and necessity should issue. It is not for the court to apply in determining the legal effect of the statute and the Commission's order.

As used in the above-mentioned paragraphs of the opinion of the Supreme Judicial Court, the words "a fixed charge" refer to a charge which is to be paid for the use

of a capital asset as distinguished from a purely operating charge. The Interstate Commerce Commission, the supreme authority in the matter of railroad accounting (*Interstate Commerce Commission* v. *Goodrich Transit Company*, 224 U.S. 194), has repeatedly ruled that contracts such as the one involved in the case at bar do not give to the licensee any rights which can be valued under section 19A of the Interstate Commerce Act.

> *Texas & Midland Railroad*, 75 I.C.C. 1, at 25.
> *Kansas City Southern Railroad*, 75 I.C.C. 223, at 235 and 248.
> *Danville & Western*, 84 I.C.C. 227, at 230.
> *Augusta Union Station*, 97 I.C.C. 586, at 590.

It follows from such rulings that the Interstate Commerce Commission has adjudicated that such charges as the $15,000 payment involved in the case at bar are not fixed charges. It results, therefore, that any payment made for such rights or facilities is an operating, as distinguished from a fixed, charge.

This result is confirmed by an examination of the orders of the Interstate Commerce Commission as to the calculation under section 15A of the Interstate Commerce Act of net railway operating income. The orders of the Commission dealing with this problem are on file under the following dates:

Period	Date of Order
For the four months from the taking effect of the Act to December 31, 1920	Jan. 16, 1922
For the year 1921	March 16, 1922
For the year 1922	March 21, 1923
For the year 1923	March 17, 1924
For the year 1924	Jan. 21, 1925
For the year 1925	Jan. 27, 1926
For the year 1926	Feb. 4, 1927
For the year 1927	Jan. 14, 1928

Attached to the orders for the years 1923 through 1927, inclusive, are forms for use by the reporting carriers. Exhibit C of these forms, for the years 1924 to 1927, inclusive, shows in detail what items are to be deducted before the calculation of net railway operating income or deficit. The orders for the years prior to 1924 show that the rules and principles applied and the calculations made are the same as those made for the years 1924 and after, but that in the latter case more detail was required by the Commission. Included among these deductions listed on the form Exhibit C are the following account titles: "Maintaining Joint Tracks, Yard and other Facilities—Dr.," the tenth item from the bottom of page 7 of the 1928 order; "Operating joint Tracks and Facilities, Dr.," the tenth item from the top of page 8 of the 1928 order; "Joint Facility Rents (Account 541)," the third item from the end of Exhibit C on page 8 of the 1928 order.

These titles are the titles of accounts prescribed by the Interstate Commerce Commission for use in the uniform system of accounts by the railroads of the country. The accounts are all explained in two published orders of the Commission, dated May 19, 1914, and respectively entitled: "The Classification of Operating Revenues and Operating expenses of steam roads," and "The Classification of Income, Profit and Loss and General Balance Sheet Accounts."

For each of the account titles set out above it will be noticed from these orders of the Commission that there are two account numbers, one the debit account to be used by the paying carrier and one the credit account.

Examination of these orders of the Commission and the description and definition of the accounts therein contained shows that the above-mentioned accounts are the ones to which would be respectively charged and credited by the carriers involved payments made on account of the service covered by the $15,000 annual payment.

The only question as to the use of these accounts would be as to the distribution of the total amount paid between the various accounts. This is practically immaterial, because all the accounts mentioned appear as deductions before the calculation of "net railway operating income." They all represent operating rather than fixed charges.

However, if it is important, the apportionment made by the payee assignee in the case at bar in accordance with special instruction 9 of "Classifications of Operating Revenues and Operating Expenses for Steam Roads" is shown on Exhibit 5 by account numbers and amounts to be as follows:

Credit Account listed by N. Y. Central (Exh. 5)	Account Title	Amount Credited	Per Cent	Debit Acc't No.
279	Maintaining joint tracks, etc.	750.00	20	278
413	Operating joint tracks, etc.	187.50	5	412
508	Joint facility rents	2812.50	75	541

It seems from the foregoing that the $15,000 payments were and should be treated as operating expenses of the petitioner, Central New England Railway Company.

It is therefore submitted that the Supreme Judicial Court of Massachusetts was in error in basing its conclusion as to the inefficacy of the order of the Interstate Commerce Commission upon the theory that the Commission did not intend to adjudicate the $15,000 annual payment to be an operating charge (see tenth paragraph of Supreme Court opinion). For this reason also the judgment herein should be reviewed.

The extent of the scope of the protection given to the petitioner by the certificate and order of the Interstate Commerce Commission is the basic question in the case. It is our contention that the decisions of this Court and the purpose and intent of the legislation make it clear that

a certificate and order granted by the Interstate Commerce Commission to a carrier are sufficient to protect from liability the carrier acting under them in an economical and efficient execution of that order. Congress intended the legislation to relieve burdens from interstate operations of carriers. The legislation will be rendered entirely ineffective unless the certificate and order fully protect the carrier acting under them from liability in suits necessarily following upon an economical and efficient execution of the order.

Colorado v. *United States*, 271 U.S. 153.

St. Paul & Tacoma Lumber Co. v. *Northern Pacific Ry. Co.*, 296 Fed. 749; 4 F. (2d) 359; 269 U.S. 535.

Hawkeye Portland Cement Co. v. *Chicago, R.I. & P. R.R.*, 198 Iowa, 1250; 201 N.W. 16 (Iowa, 1924).

These three authorities, in all of which permissive orders of commissions were held protection in suits on contracts, show clearly the immateriality of the Commission's intention as to any particular obligation in determining the legal effect of the statute and action thereunder, because in none of them is there any suggestion in the Commission's certificate or by the court as to the specific intention of the Commission with respect to the particular obligation involved.

Further, these three authorities hold clearly that even permissive orders of the Interstate Commerce Commission issued on the application of the carrier authorized are a complete protection to the carrier authorized in the carrying out of the acts authorized. The cases, particularly *Colorado* v. *United States*, 271 U.S. 153, establish the law that a carrier acting on an authorization of the Interstate Commerce Commission is immune from any liability to parties, public or private, such as that sought to be enforced by the case at bar, which would not have resulted but for

the action taken in pursuance of the order of the Commission.

In addition to the above authorities it is submitted that other numerous decisions of this Court as to various other provisions of the Transportation Act emphasize the broad scope of that legislation.

Railroad Commission v. *Chicago, B. & Q. R.R.*, 257 U.S. 563.

New York v. *United States*, 257 U.S. 592.

New England Divisions Case, 261 U.S. 184.

Dayton Goose Creek R.R. v. *United States*, 263 U.S. 456.

Railroad Comm. v. *Southern Pac. Co.*, 264 U.S. 331.

United States v. *Hubbard*, 266 U.S. 474.

Texas & Pac. R. Co. v. *Gulf, C. & S.F. Co.*, 270 U.S. 266.

Colorado v. *United States*, 271 U.S. 153.

Alabama & Vicksburg Ry. Co. v. *Jackson & Eastern Ry. Co.*, 271 U.S. 244.

These decisions affirm not only the paramount power of Congress in the field, but also the far-reaching extent of what Congress did. It is submitted that they show that this Court has established a body of law which requires that the petitioner be protected from liability for acts necessarily resulting from action ordered authorized by the Interstate Commerce Commission.

The purpose and intent of Congress require that such construction be given to the legislation involved, and that the petitioner be protected:

(a) Section 20 provides that, without securing other approval than the Commission's certificate, the carrier may proceed with the authorized abandonment. It would be a most impotent and ineffective attempt to relieve the interstate operations of the petitioner from a burden if the

petitioner relies on the order and ceases operation only to be faced with a liability for damages. By Act of Congress, as distinguished from the Commission, the defendant is given a defense to this action. To be of any real value to the defendant in interstate commerce the order must have such scope that the petitioner can fully and freely rely on it and be protected from liability in a suit such as the case at bar, which would not have resulted but for the action taken in pursuance of the Commission's order.

(*b*) If the carrier which acts on a certificate of the Interstate Commerce Commission is not free from a civil liability necessarily consequent upon the authorized action, it will mean that in each case the carrier for itself would have to determine which course of action would be cheaper. With such a result the "fostering guardianship and control" of the Commission ceases to have any force, the oft-repeated purpose to develop a national transportation system is thwarted in violation of the Act of Congress, and the judgment of other persons or courts substituted for the judgment of the Commission.

(*c*) Particularly is this true when it is realized that the petitioner had no alternative but to act under the order of the Commission and abandon what it cannot "efficiently and economically" operate. Failure to check the drain of its resources as soon as authorized by the Commission would be a violation of the mandate of section 15 *a* (2) and (3) of the Interstate Commerce Act for "honest, efficient and economical management." By so doing the petitioner not only jeopardizes its own rates (see section 15 *a*) and allows an unreasonable burden on its interstate operations to continue, but also affects the excess income held for the benefit of the transportation system.

It is clear that the permissive nature of the Commission's order is no flaw in the petitioner's defense, because most of the cases cited above were cases in which the orders of the Commission were permissive in nature. In each

case, however, the private contract involved was held modified to such extent as was sufficient to protect fully the efficient execution by the carrier authorized of the Commission's order.

It is also clear that the petitioner's own activity as applicant in bringing about the legislative order whose protection it now seeks is immaterial, because Congress and the Commission represent the public and interstate commerce as a whole.

Commissioners v. *Young*, 59 Fed. 96.
Brick Presbyterian Church v. *Mayor of New York*, 5 Cow. (N.Y.) 538.
Dunham v. *New Britain*, 55 Conn. 378.
Scovill v. *McMahon*, 62 Conn. 378.

The purpose and interpretation of the Transportation Act are such that it follows as matter of law, when the Commission authorizes an act, that the carrier authorized shall be protected from liability in doing the act authorized. The obligation of the petitioner under the contract sued upon is not unlike an obligation that might exist had the petitioner agreed with some shipper to maintain for a definite period a side-track and after the abandonment covered by the order of the Interstate Commerce Commission it could no longer furnish side-track facilities. Clearly, in that case, the certificate and order of the Commission would protect the carrier authorized from liability to the shipper.

It follows that the petitioner should be protected from liability on contracts the breach of which is necessarily and directly involved in the performance of the act ordered authorized by the Commission.

And further it is submitted that, in a case of a carrier's operation of a branch line under such an agreement as existed in the case at bar, it might very well be that the carrier by continuing operation of the branch would only

lose, including payment of a $15,000 contract charge, $5000. Under such circumstances, if the Commission issued a certificate and order authorizing abandonment, and the carrier relied on the order and ceased operation only to face a liability for damages at the full contract rate of $15,000 a year, it would appear clearly that the Commission's certificate and order had been absolutely ineffective in protecting from a burden the interstate operations of the carrier authorized. This result is contrary to the purpose and intent of the legislation as construed by this Court because the statute and the certificate and order issued thereunder must indeed have some purpose. The same principle applies where the carrier happens, as in the case at bar, to be losing more than the full contract charge by continuance of operation. If the payments at the rate of $15,000 a year are to continue, the certificate of abandonment has been no relief to the interstate operations of the petitioner, and the very purpose of Congressional action is defeated. It results, therefore, that a certificate and order of authorization by the Commission should protect the carrier authorized from liability in lawsuits necessarily and directly resulting from the performance of the act authorized.

See *Railroad Comm. of Texas* v. *Eastern Texas R.R.*, 258 U.S. 204; 264 U.S. 79.

In the first opinion in that case, this Court held that a certificate and order identical in form with the one in the case at bar were not authority protecting the applicant where purely intrastate commerce was involved. In that opinion it was said, and it is submitted that the language is exactly applicable to the case at bar:

> "The road lies entirely within a single state . . . and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce

will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. *It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.*" (Italics ours.)

We therefore submit that the petitioner should be protected in this action for damages because—

1. Private contracts dealing with interstate commerce are subject to an infirmity that Congress may act thereon.

2. Congress has acted with broad scope and purpose and passed the Transportation Act of 1920.

3. Authority and reason show that the legislative action of Congress and the Interstate Commerce Commission are sufficient in scope to protect fully the petitioner from liability in suits such as the one at bar, resulting from an economical and efficient execution of the order of the Commission.

b. There was no jurisdiction in the Massachusetts courts to hear the cause.

Cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission can be brought only in the Federal District Court. The jurisdiction of the District Court in such cases is exclusive. This results from the fact that this jurisdiction, vested in the Commerce Court by section 207 of the Judicial Code of March 3, 1911, was transferred by Act of October 22, 1913, to the District Courts.

Sec. 207, Act of March 3, 1911, c. 231; 36 U.S. Stat. at Large 1087.

Act of Oct. 22, 1913, c. 32; 38 U.S. Stat. at Large 219.

See also—

United States Comp. Stats. 1916, secs. 992, 993, 997, 998.

The motion to dismiss is not affected by the fact that it may not appear on the face of the pleadings that the suit is essentially one to annul or suspend in whole or in part an order of the Commission. When by filing of the motion or during the trial it does develop that the suit is essentially for the above purpose, the motion to dismiss should be allowed for want of the Court's jurisdiction over the subject-matter or of the United States.

Lambert Run Coal Co. v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377.

It is not necessary that the suit expressly seek to annul or set aside an order of the Commission. It is enough to bring the action within the exclusive jurisdiction of the Federal District Court that it is sought to prevent the petitioner from doing what the order authorizes, because that is equivalent to asking that the order be adjudged invalid.

Venner v. *Michigan Central R.R. Co.*, 270 U.S. 127.

Illinois Central R.R. Co. v. *State P.U. Comm.*, 245 U.S. 493, 504, 505.

North Dakota v. *Chicago & Northwestern R.R.*, 257 U.S. 485.

State of Louisiana v. *Morgan's Louisiana E.T.R. & S.S. Co.*, 18 F. (2d) 645.

The case at bar is on all fours with the above four cases except that they were bills in equity to enjoin or nullify orders of the Commission and the instant case is a suit at law whose inevitable result must be to nullify and suspend at least in part an order of the Commission by putting

upon the defendant one of the very burdens which it raised before the Commission on petition for its order.

The substance of the plaintiff's argument in the case at bar rests on the claim that the Commission's order has no application to the agreement sued on. The attempt is to limit the application of the order, suspend its operation as against the agreement sued on, and annul its effect to a certain extent.

The facts and figures of the situation were before the Commission in the proceedings for the order authorizing abandonment. Upon the whole question the Commission acted, and the plaintiff cannot in a state court suspend or annul that action. The tribunal for determination of such matters is prescribed by the United States statutes referred to above. The plaintiff would, in the case at bar, have the state court determine the effect and interpretation of action taken under a federal statute on interstate commerce, a matter confided by the United States Constitution to Congress and on which Congress has fully acted. It is just that sort of case that is properly brought only in the Federal District Court.

> *North Dakota* v. *Chicago & Northwestern R.R.*, 257 U.S. 485, *supra*.
>
> *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, 258 U.S. 377, *supra*.

The permissive nature of the order makes no difference so far as this question is concerned.

> *Chicago Junction Case*, 264 U.S. 258, and cases cited.

Either this certificate and order of the Interstate Commerce Commission is a complete defense to this action for damages or else the action becomes a suit to annul in part the effect of the order and the purpose of its issuance.

The defendant's amended motion to dismiss should therefore have been allowed because the action brought must inevitably be a suit which would directly or indirectly annul or suspend, at least in part, the order of the Interstate Commerce Commission entered in Finance Docket 1479.

Conclusion.

The petitioner therefore contends that a writ of certiorari should issue to the Superior Court of Massachusetts in order that the decision by the courts of that Commonwealth may be examined by this Court. We contend that the writ should issue because the Massachusetts courts in the case at bar have given opinions on matters of federal statutes and law, particularly under the amended Interstate Commerce Act, which are at direct variance with the opinion of the Interstate Commerce Commission and not in accord with the applicable decisions of this Court.

The Interstate Commerce Commission has issued a legislative order which specifically authorized the petitioner to abandon a line of railroad. The petitioner, in pursuance of the mandates of the Transportation Act (see section 15 *a* (2) and (3)), abandoned the line. No one ever questioned but that the abandonment of the line involved the petitioner's ceasing operation into Springfield and the use of the tracks covered by the contract sued on. After the abandonment it was physically and legally impossible for the petitioner to operate under the contract. The petitioner should therefore, as matter of law, by force of the Act of Congress, be protected from liability on the contract in a suit, such as the one at bar, brought as a direct result of action taken under and by virtue of the Commission's order.

JOHN L. HALL,
MARCIEN JENCKES,
Counsel.

[redacted]

Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 532.

CENTRAL NEW ENGLAND RAILWAY COMPANY,
PETITIONER,
v.
BOSTON & ALBANY RAILROAD COMPANY, ASSIGNOR FOR THE BENEFIT OF NEW YORK CENTRAL RAILROAD COMPANY, ASSIGNEE,
RESPONDENT.

MOTION AND REPLY BRIEF OF THE PETITIONER.

Now comes the petitioner and says that the respondent's brief states that certain allegations of the petition obviously are not supported by the record.

Wherefore the petitioner prays that it may be permitted to file the reply brief attached hereto.

By its Attorney,
JOHN L. HALL.

PETITIONER'S REPLY BRIEF.

The respondent's brief submitted in this matter states certain allegations of the petition are obviously not supported by the record. So far as the federal questions which the petitioner seeks to have decided by this Court are concerned, few of the subjects covered by the criticized allegations seem of major importance, but the respondent has raised the issue, and in order that this Court may have before it the full situation, and ready references to the parts of the record supporting the statements of the petition, we submit the following brief:

On page 12 of the respondent's brief it is said, in the paragraph numbered 1, that the allegation of the petition that petitioner "constructed the branch line referred to" is obviously not supported by the record. This suggestion of the respondent clearly ignores the contract on which the respondent has brought suit, because that contract, attached to the respondent's declaration and appearing in the record at pages 47 to 51, inclusive, states (Rec. top of page 48) as of October 25, 1899, that the petitioner is constructing and will shortly complete the branch line in question.

Also on page 12 of the respondent's brief it is stated, in the paragraph numbered 2, that the record does not support the petitioner's statement that it "operated the branch with a gradually decreasing number of trains." Near the bottom of page 64 of the record in your Court it is stated that the petitioner continued its operation "with gradual decrease in the number of trains operated." This language is contained in the opinion of the Supreme Judicial Court of Massachusetts. It is taken verbatim from page 3 of the respondent's bill of exceptions for use in that Court, which bill of exceptions, by stipulation, was made no part of the record in your Court.

In the paragraph numbered 3 on page 12 of its brief the respondent refers to its argumentative interpretation of the *certificate* of the Interstate Commerce Commission, as showing that the record does not support the statement in the petition that the petitioner applied to the Interstate Commerce Commission for a certificate covering the abandonment of its operation over the branch and the Boston & Albany tracks from Feeding Hills into Springfield. Irrespective of the inaccuracy of the respondent's interpretation of the certificate, the petitioner's statement as to its application to the Commission is entirely supported by the language of that application (original Exhibits, p. 12), paragraph 3 of which states that the petitioner proposes to abandon the operation of the branch from Feeding Hills to Agawam Junction and also to abandon "the operation of its trains between said junction and Springfield, Massachusetts, over the tracks of the Boston & Albany Railroad."

And in the paragraph numbered 4 on page 12 of its brief the respondent claims that the record does support the statement of the petition that termination of the contract on which suit is brought was necessarily incidental to the petitioner's carrying out the Commission's order. The record and exhibits show that the only connection between the petitioner's lines of railroad and those of the Boston & Albany was in accordance with the contract at Agawam Junction. The abandonment of the line from Feeding Hills to Agawam Junction therefore made it physically impossible for the petitioner's trains to come onto the lines of the Boston & Albany. After the abandonment no operation under the contract could possibly take place. The entire record, particularly the testimony as to the impossibility of operation on pages 23 and 25, clearly supports the petitioner's statement that the termination of the contract on which suit is brough. was a necessary incident

of the petitioner's acting under the Commission's order. To suggest that the petitioner confuses termination of operation under the contract with termination of the contract itself does not affect the record's support of the petitioner's statement, because the termination of the contract, which was based on operation, necessarily follows termination of operation, and because the question which the petitioner now seeks to have this Court review is whether or not there is any liability on the petitioner.

Furthermore, it is claimed in the respondent's brief, particularly on pages 11, 21, and 26, that the petitioner has not presented any federal question. This claim is without merit because it appears clearly from the petitioner's answer (Rec. p. 39), the charge of the trial judge (Rec. p. 36), the petitioner's brief before the Massachusetts Supreme Judicial Court (pages 28 to 33, inclusive), and the opinion of that Court (Rec. pp. 66 to 67), that the petitioner has fully perfected its rights under the federal statutes. Irrespective of the theories or arguments advanced by the petitioner in support of its position, the federal questions have been adequately raised in the lower Courts and it happens that those questions were raised upon the same theory as is presented in the petition and brief before this Court.

To demonstrate this with relation to the particular matters referred to on the above-mentioned pages of the respondent's brief, namely, the importance of any specific intention of the Commission, we quote from pages 28 to 30 of the petitioner's brief before the Supreme Judicial Court of Massachusetts:

> "The commission is merely exercising the delegated judgment of Congress as to whether or not there is occasion for action. That judgment being exercised and action taken by issuance of an order, the effect of the order is to be determined by the provisions of the

Transportation Act not by what the commission may have determined nor by the benefits or burdens of the situation as viewed by this Court.

"*Colorado* v. *United States*, 211 U.S. 153, at 167, where it is said: (quotation omitted)

* * * * * * * * * *

"Under the above quotation it (the Interstate Commerce Commission) has acted in the interests of interstate commerce as a whole to alleviate a drain and burden upon the defendant in its interstate operations. Its order would be most impotent and ineffective in relieving the interstate operations of the defendant from a burden if the defendant relies on the order and ceases operation only to be faced with a liability for damages. By Act of Congress, as distinguished from the Commission, the defendant is given a defense to this action. To be of any real value to the defendant in interstate commerce the order must have such scope that the defendant can fully and freely rely on it.

* * * * * * * * * *

"In the third place the carrier has no alternative but to act under the commission's order and to seek to abandon what it cannot 'efficiently and economically' operate, for (if it does not) it will be disregarding the mandate of Congress contained in Section 15a (2) and (3) of the Interstate Commerce Act for 'honest, efficient and economical management.' By so doing it not only jeopardizes its rates (see Sec. 15a) and allows an unreasonable burden on interstate commerce to continue but also affects the prospect of the United States receiving as trustee any excess income."

It appears clearly from the last paragraph above quoted that the petitioner made the same argument before the said Supreme Judicial Court on the basis of section 15*a* (2)

and (3) of the Interstate Commerce Act as is made in its brief before your Court, so that the suggestion of the respondent to the contrary, made on page 26 of its brief, is misleading.

As expressed by the Transportation Act of 1920 the clear intent of Congress to build up a national transportation system has frequently been recognized by this Court. The failure to protect the petitioner from liability in the case at bar will render ineffective the pertinent provisions of that statute and defeat the recognized legislative purpose.

We therefore submit that a writ of certiorari should issue because the record clearly shows federal questions properly raised, which as yet have not been decided by this Court, and which are of great interest and importance to the public and your petitioner.

JOHN L. HALL,
MARCIEN JENCKES,
Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 532.

CENTRAL NEW ENGLAND RAILWAY COMPANY,
PETITIONER,
v.
BOSTON & ALBANY RAILROAD COMPANY,
ASSIGNOR FOR THE BENEFIT OF THE
NEW YORK CENTRAL RAILROAD COMPANY,
ASSIGNEE, RESPONDENT.

BRIEF FOR THE CENTRAL NEW ENGLAND RAILWAY COMPANY.

This case is before this Court on a writ of certiorari granted January 2, 1929, to review the proceedings and judgment of the Superior Court of Massachusetts. The judgment was rendered against the petitioner for breach of contract. Exceptions by both parties were dismissed by the Supreme Judicial Court of the Commonwealth. The Federal questions presented are raised by the Interstate Commerce Act as amended by the Transportation Act of 1920 (41 U.S. Stats. 456, 474; 49 United States Code Ann. sec. 1 (18-21)) and the certificate of the Interstate Commerce Commission (Rec. pp. 46-47) issued under sec. 1, pars. 18 to 21 thereof, upon which the petitioner relied as a defense to the action brought and which the Massachusetts Courts held did not constitute such a defense.

STATEMENT OF THE CASE.

The suit was brought by the New York Central Railroad Company for breach of a contract dated October 25, 1899

(Exhibit 3, Rec. p. 47). This contract was executed as a result of a previous agreement, dated May 9, 1898 (Exhibit 28, Original Exhibits, p. 3), between The Boston & Albany Railroad Company, The Philadelphia, Reading & New England Railroad Company, its reorganization committee, and The Hartford & Connecticut Western Railroad Company. This earlier agreement, which set out *verbatim* all the terms of the contract sued on, contemplated the organization of the petitioner and the construction of a branch line to connect with the lines of The Boston & Albany upon the location and construction of which the petitioner and The Boston & Albany Railroad Company were to make the contract sued on. The branch line was to be constructed from the south through Feeding Hills, Connecticut, to a point of connection on The Boston & Albany known as Agawam Junction, Massachusetts, a distance of four miles from the City of Springfield, Massachusetts. The petitioner was to run its trains into Springfield over the tracks of The Boston & Albany under the license which ran until August 30, 1940, provided for by the contract sued on. The branch line was to be the only physical connection between the rails of the petitioner and those of The Boston & Albany. The only way that the petitioner could use The Boston & Albany tracks covered by the contract was by coming from the south through Feeding Hills over this new branch line.

The petitioner received by the contract no right to run any trains over the line of The Boston & Albany between the connection point and Springfield. There were no stations on the Central New England between Feeding Hills and Springfield. The petitioner's only right was to pass over with its trains about four miles of Boston & Albany tracks. Operation by the petitioner was therefore *entirely dependent* upon and ancillary to the operation of its trains from the south through Feeding Hills to the point of connection.

The map shown on the fly page opposite is reproduced from part of the blueprint map which appears in the record before the Interstate Commerce Commission (Exhibit 32, Original Exhibits, p. 30). This map shows clearly the physical situation which made it physically impossible for the petitioner's trains to come onto the lines of The Boston & Albany otherwise than over the petitioner's line from Feeding Hills to Agawam Junction. Unless that section of the petitioner's line was in existence and in operation, it would be impossible to operate under the second contract, Exhibit 3.

Within a month after the execution of this second contract (Rec. pp. 47-50) on which suit was brought, The Boston & Albany Railroad had been leased, by Exhibit 1, to the corporate predecessor of the New York Central Railroad Company.

The branch line was completed in 1902 and was operated for approximately nineteen years, until revenue and expenses for the operation from Feeding Hills into Springfield showed a loss for the year 1920 alone of $38,832.58 (Exhibit 32, Original Exhibits, p. 24).

In 1921, after investigation, the Interstate Commerce Commission issued an order authorizing the abandonment by the petitioner of this branch line between Feeding Hills and The Boston & Albany, and the petitioner, on December 15, 1921, ceased operation in accordance with the order of the Commission (Rec. p. 58; Exhibit 26, Rec. p. 24). It was the contention of the plaintiff at the trial that, despite the petitioner's cessation of operation, the plaintiff should receive up to August 30, 1940, the $15,000 per annum specified in the contract. The petitioner has been held liable to pay a verdict of $169,012.72, rendered February 23, 1927.

This was so, even though the Interstate Commerce Commission, on a record replete with every pertinent historical and economic detail, had issued its order authorizing the abandonment of the branch line, the use of which was es-

sential to the passing of the petitioner's trains over the tracks of The Boston & Albany.

The physical situation at Agawam Junction is well illustrated by the map reproduced herewith and by Exhibits 23, 24, 25, and 35. It is about four miles from Agawam Junction to Springfield. Agawam Junction is 1.86 miles from Feeding Hills, Connecticut, and about 14 miles from Tariffville, Connecticut (Rec. pp. 19, 26).

The layout at Springfield is well illustrated by Exhibits 22, 24, and 29, and it is described on pages 25 and 26 of the record.

The New York Central Railroad Company was the original plaintiff, basing its rights upon two assignments (Rec. pp. 2 and 3):

1. That of The Boston & Albany Railroad Company to the New York Central & Hudson River Railroad Company, dated November 15, 1899, contained in the lease of The Boston & Albany Railroad to the New York Company (Exhibit 1), and—

2. That of the New York Central & Hudson River Railroad Company to it contained in the consolidation agreement (Exhibit 2).

By amendment allowed June 19, 1928, after the rescript from the Supreme Judicial Court, The Boston & Albany Railroad Company, assignor for the benefit of the New York Central Railroad Company, became the plaintiff.

Outline of Facts.

The contract on which the suit was brought contains a single "whereas" clause referring to Exhibit 28 and the construction of the line to connect with The Boston & Albany. The claim against your petitioner is for breach of the obligation contained in paragraph first of the contract, Exhibit 3 (Rec. p. 48). This paragraph provided generally that from and after the opening of the branch line

for the passage of regular trains until the 30th day of August, 1940, The Boston & Albany Railroad Company was to "license and permit, subject to the regulation and control" by itself of the train movement, the petitioner and its successors "to pass with trains and locomotives over the line of the Albany Company between the point of connection west of the Connecticut River and the yard and engine houses at West Springfield in each direction, and further for passenger trains across the bridge over the Connecticut River and into the Union Station at Springfield, with the right to use in connection with such trains all water stations and other facilities necessary for the accommodation of such trains and the traffic to be transported by them," the petitioner "paying to the plaintiff therefor fifteen thousand dollars ($15,000) per annum in equal quarterly payments on the first days of January, April, July and October of each year, the first payment to be made upon the first quarterly period next succeeding the opening of said branch line for the passage of regular trains."

The first paragraph also provided for proportionately increased payments if the number of trains exceeded a specified number, and for payment to be made by the petitioner if it used the Albany's water stations or engine stalls.

The second paragraph of the body of the agreement provided rates for the transfer of freight cars.

The third paragraph required the Albany Company to sell tickets, handle baggage, and take care of passenger trains, and transfer through passenger cars to connecting lines.

The fourth paragraph provided for the petitioner to build and maintain an interlocking tower at the junction of its road and the Albany.

The fifth paragraph dealt with the ascertainment and apportionment of responsibility in case of accident or loss.

The sixth paragraph provided that the petitioner should make payments required by the contract in accordance with the terms thereof.

The seventh and last paragraph dealt with the transfer of the contract rights and the effect of bankruptcy, etc.

When the line was constructed it was the intention to have another route for business from the Southern and Middle states, but the traffic never materialized, as competitive lines retained the business (Original Exhibits, p. 29).

Operation by the petitioner over the branch line and into Springfield began on September 15, 1902, and continued with a gradually decreasing number of trains operated until December 15, 1921. Payments were made by the petitioner for all charges billed against it under the contract up to and including December 15, 1921. The suit brought, therefore, sought to recover only payments to be made in the future (Rec. pp. 5, 62).

In May, 1921, the petitioner filed, under section 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920 (41 Stat. at Large, 474; 49 U.S. C.A. sec. 1 (18-21)), an application with the Interstate Commerce Commission for a certificate of public convenience and necessity, permitting the abandonment of operation of its line between Feeding Hills and Agawam Junction (Exhibit 32, Original Exhibits p. 12). The required statutory notice of the petition and proceeding was duly given and pursuant to the requirements of the statute and the Commission the application was published in full. This application set forth that a certificate was sought permitting the abandonment of operation of the petitioner's line between Feeding Hills and Agawam Junction, and that the petitioner proposed "to abandon the operation of that portion of said branch between the station at Feeding Hills in the town of Agawam and said Junction and in addition to abandon the operation of its trains between said junc-

tion and Springfield, Massachusetts, over the tracks of the Boston & Albany Railroad."

The record of the proceedings before the Interstate Commerce Commission (Original Exhibits, pp. 11 to 36) shows, among other things, the contract of October 25, 1899, between the Central New England Railway Company and The Boston & Albany Railroad Company, setting out the payment to The Boston & Albany of $15,000 per annum, the financial condition of the petitioner, a copy of its balance sheet, its income statements for each of the five years next preceding the current year as well as for a portion of the current year, the fact that only a portion of the track north of Feeding Hills was to be abandoned, the amount of passenger and freight traffic which was handled for each of the five years next preceding the current year and the revenue derived from each class, the fact that the volume of traffic, freight and passenger, had diminished during recent years, that the total business of the petitioner for the five years ending December 31, 1920, resulted in a loss of $4,226,356.95 and that there was a total loss for 1920 from operating the branch line of $38,832.58.

The record before the Commission also shows that the proposed abandonment was from a point 350 feet northerly of the passenger station at Feeding Hills to the end of the branch at Agawam Junction as indicated on a plan, that it was the intention to abandon the operation of trains between Agawam Junction and Springfield over the tracks of The Boston & Albany as indicated on a blueprint (see reproduction thereof, opposite page 3 of this brief), "it now being handled under rental agreement."

It was further disclosed to the Commission that there was not sufficient volume of traffic over the line proposed to be abandoned "to warrant continuation of the high operating cost including the expense of rental for the use of the Boston & Albany tracks, signal station at Agawam Junction and passenger and freight facilities at Spring-

field, making it essential in the interest of economical operation that the proposed abandonment be effected" (Original Exhibits p. 29).

Among other things the Commission found that the trains of the petitioner entered Springfield by using four miles of The Boston & Albany Railroad; that under the trackage agreement the applicant was to pay The Boston & Albany $15,000 a year for the right to operate over the track; that the petitioner proposed to abandon about 1.87 miles of track from Feeding Hills to its connection with The Boston & Albany and that for the year 1920 the line showed an *operating* loss of $38,832.58. This figure included the $15,000 contract charge (Original Exhibits, p. 24).

The proceeding was submitted to the Commission on September 3, 1921. It was decided September 8, 1921, when the Commission issued its certificate in which it was ordered that the petitioner be authorized to abandon the line of railroad (Exhibit A, Rec. p. 45; Exhibit 32, Original Exhibits, pp. 34 to 36).

By letter dated November 9, 1921 (Exhibit 7, Record, p. 8), the plaintiff was informed that the defendant, by virtue of the certificate of the Commission, proposed to discontinue operation into Springfield and to cease to use the privileges of Exhibit 3. On December 14, 1921, the defendant operated its last train out of Springfield. The petitioner's line from Feeding Hills to Agawam Junction was abandoned for service or operation (Rec. pp. 25, 26). Within a few months the physical connection at Agawam Junction was severed. It became legally and physically impossible for the petitioner to operate its trains over the tracks of The Boston & Albany into Springfield (Rec. pp. 23, 25). After the abandonment no operation under the contract could possibly take place. It follows that the termination of the contract on which suit is brought was a necessary incident of action by the petitioner in accordance with the certificate and order of the Commission.

This action to recover damages at the rate of $15,000 a year for more than eighteen years was begun in April, 1922. At the trial the petitioner claimed that the original plaintiff had suffered no damages by reason of the cessation of operation because the cost to the original plaintiff, if the petitioner operated the full contract allowance of trains, would be as much or more than $15,000 a year. The original plaintiff, on the other hand, contended that it should be allowed to recover the full $15,000 a year without deduction because the petitioner had entirely repudiated the contract and because it received no benefit from the petitioner's failure to operate.

Specification of Errors.

The petitioner contends that the amended Interstate Commerce Act and the certificate and order of the Commission issued thereunder are a defense to the action brought. The judgment of the Superior Court of Massachusetts as affirmed by the Supreme Judicial Court has denied to the petitioner the protection of proper Congressional legislation. It is submitted that a mandate should issue from this Court ordering judgment to be entered for the defendant because the Courts of Massachusetts have erred in the following ways:

1. By denying the petitioner's motion (Rec. p. 29) that the Court direct a verdict in its favor (see the charge of the trial judge, Rec. p. 36).

2. By denying the petitioner's request (Rec. p. 30) that upon all the evidence the plaintiff was not entitled to recover.

3. By granting the request of the plaintiff, respondent (Rec. p. 30), that as matter of law it was no defense that the petitioner abandoned its line of railroad and ceased operation into Springfield in pursuance of and reliance on the certificate of the Interstate Commerce Commission.

4. By ruling (Rec. p. 36) that as matter of law the certificate of the Commission could not affect the contractual rights of the respondent.

5. By ruling (Rec. pp. 36, 69) that, so far as the question of liability is concerned, all consideration of the certificate of the Commission was to be dismissed.

6. By denying the petitioner's amended motion to dismiss (Rec. pp. 30, 45).

Statutes Involved in the Case.

Interstate Commerce Act, as amended by the Transportation Act of February 28, 1920, 41 Stat. at Large, 456, 477, sec. 1, pars. 18 to 21, incl. (49 U.S. C.A. 1 (18-21)):

> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.
>
> "(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission

may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any direc-

tor, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: Provided, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

Judicial Code, sec. 24, amended, 28 United States Code Annotated, sec. 41 (28):

"The district courts shall have original jurisdiction as follows:

". . . (28) Of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission. (June 18, 1910, c.

309, § 1, 36 Stat. 539; Mar. 3, 1911, c. 231, § 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)"

Judicial Code, sec. 208, 28 United States Code Annotated, sec. 46:

"Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. (June 18, 1910, c. 309, § 3, 36 Stat. 542; Mar. 3, 1911, c. 231, § 208, 36 Stat. 1149.)"

Outline of Argument.

1. The amended Interstate Commerce Act and certificate and order of the Commission issued thereunder protect the petitioner from any liability in this action.

1. The Scope and Purpose of the Amended Interstate Commerce Act.

2. Exercise by the Interstate Commerce Commission of its Authority under the Amended Interstate Commerce Act has the Effect of Congressional Legislation.

3. The Statute and the Certificate and Order of the Commission are Paramount over Obligations Arising from Private Contracts or even Explicit Charter Provisions.

4. The Statute and Order of the Commission Issued in the Case at Bar Protect the Petitioner from the Liability Sought to be Enforced against It.

(*a*) The Commission's finding of public convenience and necessity and its unconditional order protect the petitioner's action thereunder.

(*b*) The recognized intention of Congress protects the petitioner in the situation at bar.

(*c*) The permissive nature of the order of the Commission and the petitioner's initiative in obtaining it are immaterial.

(*d*) The specific intention of the Commission as to any particular contract is immaterial.

(*e*) The proceedings before the Commission were proper.

(*f*) The accounting nature of the payment under the contract is such that the petitioner should be protected from the liability at bar.

(*g*) Other authorities and examples distinguished. The question of hardship.

5. The Opinion of the Supreme Judicial Court of Massachusetts.

6. The Congressional Purpose would be Nullified by the Enforcement Against the Petitioner of the Liability Involved in the Case at Bar.

II. There was no jurisdiction in the Massachusetts Courts to hear the cause.

III. Conclusion.

Argument.

I. The Amended Interstate Commerce Act and the Certificate and Order of the Commission Issued Thereunder Protect the Petitioner from Any Liability in This Action.

1. The Scope and Purpose of the Amended Interstate Commerce Act.

The Transportation Act of 1920 (41 U.S. Stats. 456, 474) amending the Interstate Commerce Act was an exercise of the paramount Congressional power under the Federal Constitution to regulate interstate and foreign commerce.

By that statute Congress introduced into Federal legislation a new railroad policy.

> *Railroad Comm. of Wisconsin* v. *Chicago, Burlington & Quincy R.R.*, 257 U.S. 563, 585.

This new purpose of developing and insuring an adequate national transportation system was expressed by Congress in unequivocal language.

> *New England Divisions Case*, 261 U.S. 184, at 189, and footnote.

As stated by the Chief Justice in the case sustaining the constitutionality of the recapture provisions of the Act (sec. 15*a*), *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U.S. 456, at 478:

> "The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

In its opinions dealing with various provisions of the amended Interstate Commerce Act, this Court has made clear the broad scope of the Congressional purpose to build

up and maintain through the supervision of the Interstate Commerce Commission an efficient national transportation system able to meet promptly and adequately the needs of the country.

Railroad Comm. of Wisconsin v. *Chicago, Burlington & Quincy R.R.*, 257 U.S. 563.
New York v. *United States*, 257 U.S. 591.
Railroad Comm. of Calif. v. *Southern Pac. Co.*, 264 U.S. 331.
Texas v. *Eastern Texas R.R.*, 258 U.S. 204; 264 U.S. 79.
United States v. *Hubbard*, 266 U.S. 474.
Texas & Pac. Ry. Co. v. *Gulf, C. & S.F. R.R. Co.*, 270 U.S. 266.
Colorado v. *United States*, 271 U.S. 153.
Alabama & Vicksburg Ry. Co. v. *Jackson & Eastern Ry. Co.*, 271 U.S. 244.

2. Exercise by the Interstate Commerce Commission of its Authority under the Amended Interstate Commerce Act has the Effect of Congressional Legislation.

In the Interstate Commerce Act as amended by the Transportation Act of 1920 Congress broadly exercised its power and occupied the field of interstate commerce by taking possession of the following (among many other) branches of regulation of interstate commerce and interstate carriers:

1. Establishing through routes and joint rates, sec. 1 (4), sec. 15 (1), (3), and (4).

2. Furnishing facilities for interchange of traffic, sec. 1 (4).

3. Construction of switch connections, sec. 1 (9).

4. Construction and abandonment of lines, sec. 1 (18-21).

5. Discrimination, preference, etc., between persons, localities, or connections, sec. 3 (1) and (3).

6. Publication of rates and schedules, sec. 6.

7. Discrimination against interstate commerce, sec. 13 (4).

8. Routing of traffic, sec. 15 (8-10).

9. Return on investment, sec. 15*a*.

10. Issuance of securities, sec. 20*a*.

The regulation of these and other fields through the Interstate Commerce Commission is to accomplish the building up and maintenance of a national transportation system adequate for the growing needs of the public. The different provisions of the Act are parts of the Congressional plan to accomplish this great purpose. Each section is to be interpreted in the light of the underlying purpose of the legislation which aimed to give owners of railways an opportunity to efficiently maintain their properties.

The Act put the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission. The Commission's supervision of the abandonment by railroads of old lines was one of the means whereby the great Congressional purpose was to be achieved.

> *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U.S. 456, at 478.

Action by the Commission under any section of the Act is an exercise of the delegated power of Congress. The power is exercised in the interests of interstate operations (*Colorado* v. *United States*, 271 U.S. 153, at 162). The legislative effect of Congressional action results immediately from any action of the Commission taken in pursuance of the statutory provisions. Action by the Commission within the scope of the Act is as final and effective as action

by Congress. As stated by this Court in the most recent decision giving effect to the very provisions of the statute involved at bar, *Colorado* v. *United States, supra,* at 166:

> "The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission."

By the statute Congress prescribed the powers and duties of the Commission and specified the way it should act. The effect of the Commission's exercise of the delegated power of Congress is the effect of an Act of Congress. Courts will not review determinations of the Commission made within the scope of its power, or substitute their judgment for its findings.

United States v. *New River Co.*, 265 U.S. 533.
Interstate Comm. Comm. v. *Illinois Central R.R. Co.*, 215 U.S. 452.
New England Divisions Case, supra.
Colorado v. *United States, supra.*

3. The Statute and the Certificate and Order of the Commission are Paramount over Obligations Arising from Private Contracts or even Explicit Charter Provisions.

The completeness of the Constitutional grant to Congress of power over interstate commerce and contracts involved therein has never been questioned. It may even be used to prohibit (*United States* v. *The William*, 28 Fed. Cases, 614, where embargo laws of 1807 and 1808 were upheld. *The Lottery Case*, 188 U.S. 321). Certainly any contract dealing with interstate commerce is subject to an infirmity that Congress may legislate so as to alter that contract. Such legislation is paramount in its field and cuts across public or private arrangements of any

kind. It is not to be hampered or restricted to any extent by contracts previously made between individuals or corporations.

Addyston Pipe & Steel Co. v. *United States*, 175 U.S. 211.
Louisville & Nashville R.R. Co. v. *Mottley*, 219 U.S. 467, 482.
Union Bridge Co. v. *United States*, 204 U.S. 364, 399, 400.
Armour Packing Co. v. *United States*, 209 U.S. 56.
Atlantic Coast Line R.R. Co. v. *Riverside Mills*, 219 U.S. 186.
Minnesota Rate Cases, 230 U.S. 352.
New England Divisions Case, 261 U.S. 184.
Dayton-Goose Creek Ry. Co. v. *United States*, 263 U.S. 456.

Even explicit charter provisions must yield to this paramount power.

Colorado v. *United States*, 271 U.S. 153, 165.
New York v. *United States*, 257 U.S. 591, 601.

Wherever public or private rights interfere with the efficient execution of the activities of Congress under the commerce clause, those rights or interests must give way even without compensation to the person affected thereby.

Union Bridge Co. v. *United States*, *supra*.
Houston East & West Texas Ry. Co. v. *United States*, 234 U.S. 342.
Delaware, Lackawanna & Western R.R. Co. v. *United States*, 231 U.S. 363.
Greenleaf Johnson Lumber Co. v. *Garrison*, 237 U.S. 251.
Louisville Bridge Co. v. *United States*, 242 U.S. 409, 421.

The Commission itself has recognized in two recent decisions that private contracts cannot hamper or restrict the operation of the provisions of the statute which it administers.

> *Abandonment by Chicago, Rock Island & Pacific R.R. Co.*, 131 I.C.C. 421, at 430.
> *Chicago & Alton Railroad Co.* v. *Toledo, Peoria & Western Ry. Co.*, 146 I.C.C. 171, at 181.

The law is clear that in the field of interstate commerce the amended Interstate Commerce Act and action thereunder is absolutely supreme.

4. The Statute and Order of the Commission Issued in the Case at Bar Protect the Petitioner from the Liability Sought to be Enforced against It.

(a) *The Commission's Finding of Public Convenience and Necessity and its Unconditional Order Protect the Petitioner's Action Thereunder.*

In December, 1921, the petitioner discontinued operation into Springfield, Massachusetts, and ceased to use any of the privileges of the contract of October 25, 1899 (Exhibit 3, Rec. p. 47). This discontinuance was by virtue of an order of the Interstate Commerce Commission made after a finding that the convenience and necessity of the national transportation system permitted abandonment of the branch line. In that proceeding the Commission found that the revenue for the year 1920 derived from this line was $2686.04 and the operating expenses $41,518.62, resulting in an operating loss of $38,832.58 (Original Exhibits, p. 24).

The certificate and order of the Commission were issued under paragraphs 18 to 21 of section 1 of the Act. They specifically authorized the petitioner to abandon the line of railroad from Feeding Hills to Agawam Junction. No

one ever questioned that the abandonment of that railroad necessarily involved the cessation of the petitioner's operation into Springfield and the use of the tracks covered by the contract sued on. The contract gave the petitioner no right to operate over the lines of The Boston & Albany independently from service from the south over the abandoned line. The contract was premised upon the operation of that line. The whole situation was before the Commission. The record before the Commission contained a complete historical and financial analysis of the petitioner's situation (Exhibit 32, Original Exhibits, pp. 11-36, incl.). The important terms of contract were incorporated into the certificate issued by the Commission (Rec. pp. 47, 46).

On this record the Interstate Commerce Commission decided that the present and future public convenience and necessity permitted the petitioner to abandon its line of railroad from Feeding Hills to a point where said line connected with The Boston & Albany Railroad. In pursuance of the provisions of the Interstate Commerce Act all matters properly bearing on that question of public convenience and necessity were submitted to and acted on by the Commission. In ruling that the public convenience and necessity permitted the abandonment, the Commission was attempting to relieve the burden on the interstate operations of the petitioner which continued operation would undoubtedly mean. With the entire situation before it, the Commission issued an unconditional certificate and order authorizing the petitioner to abandon its line of railroad.

After the abandonment it was *physically impossible* for the petitioner to operate into Springfield under the contract. The breach of contract for which it is sought to hold the petitioner liable was necessarily incident to an efficient execution of the abandonment authorized.

And further it is to be noted that operation ceased over the branch from Feeding Hills to Springfield. That op-

eration cannot be commenced again without a certificate of public convenience and necessity from the Interstate Commerce Commission because paragraphs 18 to 21 of section 1 of the amended Act prevent the operation of any line of railway or extension thereof unless and until such certificate shall have been first obtained. The abandonment authorized therefore made it legally as well as physically impossible to continue with the contract sued on.

Chicago & Alton Railroad Co., et al. v. *Toledo, P. & W. Railway Co.*, 146 I.C.C. 171, at 180-181, and cases cited in the footnote thereat.
Operation by Illinois Central, 72 I.C.C. 111.
Operation by Southern Pacific Co., 117 I.C.C. 342.
Operation and Abandonment by Atchison, Topeka & Santa Fe Ry., 131 I.C.C. 506.

The determination by the Commission that public convenience and necessity permitted the abandonment is the exercise of power delegated to the Commission by Congress. The action is final and not open to revision in this proceeding. It protects the petitioner in relieving its operations from the burden presented to the Commission. The $15,000 annual contract charge was clearly an element of that burden, for it was included in the operating loss found by the Commission (Rec. p. 46; Original Exhibits, p. 24).

It follows as matter of law that the petitioner should be fully protected in the case at bar because the liability sought to be enforced against it is incidental to and arises directly from an efficient performance of action authorized by the Commission.

As said by this Court in *Colorado* v. *United States*, 271 U.S. 153, at 162, concerning a permissive certificate and order of the Commission identical in form to the one at bar—

> "The certificate issues, not primarily to protect the railroad, but to protect the interstate commerce from undue burdens or discrimination. The commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty."

The Commission, by paragraph 20 of section 1, has the power to attach conditions to orders issued on applications for certificates and orders of abandonment. Such conditions may properly deal with any resulting hardship, and take care of persons, private or public, who object to the granting of an order.

See *Control of Hereford Ry. Co.*, 99 I.C.C. 7.

This power to impose conditions and the legislative nature of the Commission's order both show that the place for any objecting party to be heard is before the Commission or in the Federal Courts, as provided by sections 207, 208, and amended section 24 of the Judicial Code (see section II of this brief, p. 50). The issuance of an unconditional order by the Commission leaves parties affected no remedy but to seek to attack the order in a proper forum with jurisdiction.

In the case at bar the respondent has taken no action before the Commission or the Federal Court. There is no hardship on it, because it has been paid in full for all past performance and it has not suffered any expense by reason of the cessation of operation. The obligation of the petitioner under the contract sued upon is not unlike an obligation that might exist had the petitioner agreed with some shipper to maintain for a definite period a side-track and after the abandonment of the main track covered by an unconditional order of the Interstate Commerce Commission it could no longer furnish side-track facilities. Clearly, in that case, the certificate and order of the Com-

mission would protect the carrier so authorized from liability to the shipper.

It is therefore submitted that the Commission's certificate of public convenience and necessity and the unconditional order of abandonment should protect the petitioner in the case at bar, because the liability sought to be enforced was part of the burden on the interstate operations of the petitioner caused by the operation of the line whose abandonment was authorized.

(*b*) *The Recognized Intention of Congress Protects the Petitioner in the Situation at Bar.*

Paragraph 20 of section 1 of the amended Interstate Commerce Act provides that, without securing other approval than the Commission's certificate, the carrier may proceed with the abandonment covered thereby. It would be an impotent and ineffective attempt to relieve the interstate operations of the petitioner from a burden if the petitioner relies on the order and ceases operation, only to be faced with a liability for damages. By Act of Congress, as distinguished from the act of the Commission, the defendant is given a defense to this action. To be of any real value to the petitioner in interstate commerce the order must have such scope that the petitioner can fully and freely rely on it and be protected from liability in a suit such as the case at bar, which would not have resulted but for the action taken by virtue of the Commission's order.

If the carrier which acts on a certificate of the Interstate Commerce Commission is not free from a civil liability necessarily consequent upon the authorized action, it will mean that in each case the carrier for itself would have to determine which course of action would be cheaper. With such a result the "fostering guardianship and control" of the Commission ceases to have any force, the oft-repeated purpose to develop a national transportation system is

thwarted in violation of the Act of Congress, and the judgment of other persons or Courts substituted for the judgment of the Commission.

Furthermore, the petitioner had no alternative except to abandon the operation involved in the case at bar because section 15*a* (2) and (3) of the amended Interstate Commerce Act makes it mandatory upon the petitioner to abandon, when authorized by the Commission, operations which can not be efficiently and economically conducted. The requirement of the Act and the purpose of the Commission's order was to check the drain on the interstate operations of the petitioner which was caused by the operation of the branch line from Feeding Hills to Springfield. The petitioner's failure to do so would permit the continuation of what the Interstate Commerce Commission had found to be an unreasonable burden on interstate operations. The Congressional mandate for "honest, efficient and economical management" would be violated. The petitioner would not only jeopardize its own rates (see section 15*a*), but also affect the excess income held for the benefit of the transportation system.

It follows that in the case at bar judgment should be entered for the petitioner because the respondent seeks to enforce against the petitioner a liability which resulted directly from the efficient execution of action which the Interstate Commerce Commission, acting under the delegated power of Congress in the interests of developing the national transportation system, found to be permitted by public convenience and necessity.

See *Texas* v. *Eastern Texas R.R. Co.*, 258 U.S. 204; 264 U.S. 79.

In the first opinion in that case this Court held that a certificate and order identical in form with the one in the case at bar were not authority protecting the applicant

where purely intrastate commerce was involved. In that opinion it was said, at page 216, and it is submitted that the language is exactly applicable to the case at bar:

> "The road lies entirely within a single State . . . and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. *It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.*" (Italics ours.)

It follows that orders of the Interstate Commerce Commission permissive in form and issued on the application of the carrier authorized are complete protection to the carrier in the accomplishing of the Congressional purpose to relieve the carrier's interstate operations from a burden and thereby to build up the national system.

> *Colorado* v. *United States*, 271 U.S. 153.
> *New York* v. *United States*, 257 U.S. 591.
> *New England Divisions Case*, 261 U.S. 184.

In *New England Divisions Case, supra*, it followed upon action of the Commission that numerous private contracts between carriers became wholly or partially unenforcible. This was so even though the Commission made no reference to the particular contracts affected.

In *New York* v. *United States, supra*, a permissive order of the Commission (*Ex Parte 74*, 58 I.C.C. 220), made private contracts and state laws unenforcible when they con-

flicted with efficient execution of the action authorized by the Commission.

In *Colorado* v. *United States, supra,* where it was held that a permissive order of the Commission identical in form to the one at bar was complete protection to the carrier acting thereunder, the order was said to be of such a nature that "even explicit charter provisions" yielded to it.

See also *St. Paul & Tacoma Lumber Co.* v. *Northern Pacific Ry. Co.*, 296 Fed. 749; 4 F. (2d) 359; 269 U.S. 535.

Hawkeye Portland Cement Co. v. *Chicago, R.I. & P. R.R.*, 198 Iowa, 1250; 201 N.W. 16—

where permissive orders of commissions were held to protect the carrier in actions for breach of contract even though the orders of the commissions contained no reference to the specific contract involved.

The situation of the petitioner in the case at bar is clearly within the protection afforded by the intent of Congress as recognized by the above decisions. It must be that when the Commission orders or authorizes an action it follows that the Congressional purpose protects the carrier authorized from efficiently relieving its interstate operations from the burden found by the Commission.

Other decisions of this Court also make it clear that the purpose and interpretation of the Interstate Commerce Act, as amended by the Transportation Act of 1920, are such that it follows as matter of law, when the Commission authorizes an act, that the carrier so authorized shall be protected from liability incidental to or arising directly from an efficient execution of the action authorized.

Wisconsin Railroad Comm. v. *Chicago, B. & Q. R.R.*, 257 U.S. 563.

Dayton-Goose Creek Ry. Co. v. *United States*, 263 U.S. 456.
Railroad Comm. of Calif. v. *Southern Pac. Co.*, 264 U.S. 331.
United States v. *Hubbard*, 266 U.S. 474.
Texas & Pac. Ry. Co. v. *Gulf, C. & S.F. R.R. Co.*, 270 U.S. 266.
Alabama & Vicksburg Ry. Co. v. *Jackson & Eastern Ry. Co.*, 271 U.S. 244.

The act of Congress properly interpreted in a field in which it is paramount requires that all public and private arrangements give way to an economical and efficient execution of action ordered or authorized by Congress itself or by the administrative body which Congress has created to determine the times, places, and conditions of such action.

Congress intended the legislation to build up an adequate national transportation system and to relieve burdens from interstate operations of carriers. The legislation will be rendered ineffective unless a carrier acting under a certificate and order is fully protected from liability in suits such as the one at bar, resulting from an efficient execution of the order.

It results that the petitioner should be protected from the liability in the case at bar because such liability was necessarily and directly involved in the efficient performance of the act ordered authorized by the Commission and a contrary result would nullify the declared and recognized paramount intention of Congress.

Ozawa v. *United States*, 260 U.S. 178, 194.
Taylor v. *United States*, 207 U.S. 120.
Hawaii v. *Mankichi*, 190 U.S. 197, 212.

(c) The Permissive Nature of the Order of the Commission and the Petitioner's Initiative in Obtaining It are Immaterial.

Most of the cases cited above involved orders of the Commission which were permissive in nature. In each case, however, the private contract involved was held modified to such extent as was sufficient to protect fully the efficient execution by the carrier authorized of the Commission's order. It is the intention of Congress which so protects action taken by virtue of certificates or orders issued under the statute. The Commission, by issuing the certificate, states the time and place where the Act of Congress is to be immediately applicable. Private obligations involved are affected by direct force of Congressional intent. Any such effect is not dependent on the Commission's specific or mandatory intent.

The petitioner had no alternative except to act under the order of the Commission and abandon what it cannot "efficiently and economically" operate. Failure to check the drain of its resources as soon as authorized by the Commission would be a violation of the mandate of section 15*a* (2) and (3) of the Interstate Commerce Act for "honest, efficient and economical management." By so doing the petitioner not only jeopardizes its own rates (see section 15*a*) and allows an unreasonable burden on its interstate operations to continue, but also affects the excess income held for the benefit of the transportation system.

It follows that the permissive nature of the Commission's order in the case at bar is no flaw in the petitioner's defense.

It is also clear that the petitioner's own activity as applicant in bringing about the legislative action which it now claims as protection is immaterial, because Congress and the Commission represent and act for the public and interstate commerce as a whole.

New England Divisions Case, supra.
Colorado v. *United States, supra.*
Commissioners v. *Young*, 59 Fed. 96.
Brick Presbyterian Church v. *Mayor of New York*, 5 Cow. (N.Y.) 538.
Dunham v. *New Britain*, 55 Conn. 378.
Scovill v. *McMahon*, 62 Conn. 378.

(d) The Specific Intention of the Commission as to any Particular Contract is Immaterial.

The certificate and order of the Interstate Commerce Commission involved in the case at bar were issued under paragraphs 18 to 21 of section 1 of the amended Interstate Commerce Act. In a proceeding under these paragraphs the Commission acts in the interests of interstate operations (*Colorado* v. *United States*, 271 U.S. 153, at 162). In so acting and determining when public convenience and necessity permit certain things, it acts as an administrative body within a limited legislative field. It weighs the benefits and burdens, exercises its judgment upon the particular facts, and issues or denies a certificate in accordance with the provisions of the statute (*Colorado* v. *United States, supra*, at 165 and 167). Upon such issuance the Congressional legislation becomes effective and paramount. This limited delegation to the Commission is of legislative, not judicial, power. The Commission's action may state the time or place of efficacy, but the result on private or public obligations is the result of the Act of Congress. The Commission's judgment being exercised and action taken by issuance of an order, the effect of the order is to be determined by the provisions of the Federal legislation, not with reference to the Commission's specific intent, nor according to a court's view of the benefit or benefits of the situation.

Colorado v. *United States, supra.*

Houston East & West Texas Ry. Co. v. *United States*, 234 U.S. 342.
Union Bridge Co. v. *United States*, 204 U.S. 364.

Considerations as to the advisability of the Commission's action are quite immaterial in determining the legal effect of the Commission's order. The Commission only considers the expenditures of the applicant as one factor in determining the underlying question, namely, whether the operation of the branch was a burden on the interstate operations of the petitioner. The amount or nature of losses involved in the operation which it is proposed to abandon are for the consideration of the Commission in determining whether or not a certificate of public convenience and necessity should issue. They are not for a court to consider in determining the legal effect of the statute and the Commission's order.

The determining factor on the question of affecting a private contract is the purpose and intent of Congress expressed in the legislation. Private contracts are affected so far as they are related to the accomplishment of that purpose. The specific intention of the Commission as to any particular obligation is quite immaterial, because the effect of action taken in pursuance of that order is determined, not by the Commission's primary intention, but by the intention of Congress.

Colorado v. *United States, supra.*
New England Divisions Case, 261 U.S. 184.
Texas v. *Eastern Texas R.R. Co.*, 258 U.S. 204.
New York v. *United States*, 257 U.S. 591.

In none of the authorities dealing with the effect of certificates or orders of the Interstate Commerce Commission is there any suggestion that the specific intention of the Commission with respect to the particular obligation involved is material. It follows that the Commission's in-

tention as to any particular obligation is immaterial in determining the legal effect of the statute and action thereunder.

(e) The Proceedings before the Commission were Proper.

Paragraph 19 of section 1 of the amended Act contained explicit provisions as to notice and a hearing on applications for certificates of public convenience and necessity under paragraph 18. *The petitioner fully complied with all of these statutory provisions as to notice.* The administrative function of the Commission was fully and properly performed in accordance with the procedure devised by Congress. The consequences of that action cannot be affected by any alleged defect in the notice or procedure prescribed by the statute. Any such claim goes to the propriety of the Congressional enactment, not to the action of the Commission.

The respondent had notice at least as early as November 8, 1921, before operation had ceased, that the petitioner had been authorized by the Commission and was about to cease operation and to discontinue payments under the contract (Exhibit 7, Rec. p. 8). The rules of practice before the Commission, prescribed under authority of section 17 of the Act, gave the respondent an opportunity then to reopen the proceeding 1479 on the Commission's Finance Docket (Rules of Practice before the Commission, 1920, pp. 3, 4, 22). The opportunity for review by a judicial tribunal existed under sections 207 and 208 of the Judicial Code.

Interstate Commerce Comm. v. *Diffenbaugh*, 222 U.S. 42, 49.

Skinner & Eddy Corp. v. *United States*, 249 U.S. 557, 562.

28 U.S. C.A. 41 (27-28 and footnote to 27).

The respondent, however, made no effort to take action in either forum. It has, on the other hand, been content to rest on the proposition that as a matter of law its claim against the petitioner cannot be affected by the order of the Commission and action thereunder (Plaintiff's Request 22, Rec. p. 30). It follows that the respondent cannot now complain of any lack of notice, nor of any illegality or impropriety in the statute or in the Commission's order.

The administrative action of the Commission in the case at bar is of a legislative rather than of a judicial nature.

> *Abandonment by Chicago, Rock Island & Pacific R.R. Co.*, 131 I.C.C. 421, at 430.
> *Colorado* v. *United States, supra.*

If the action is legislative, there is no requirement that parties affected have notice or a hearing. If, however, it is judicial, the opportunity for review is complete protection to the parties affected. It follows, therefore, that the Federal statutes giving the respondent an opportunity for judicial review clearly make the Congressional legislation valid. Therefore it is immaterial that the respondent was not a party to the proceeding before the Commission or that the case was submitted to the Commission "without a formal hearing."

> *Field* v. *Clark*, 143 U.S. 649.
> *Union Bridge Co.* v. *United States, supra.*
> *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U.S. 287.
> *Chicago Junction Case*, 264 U.S. 258.
> *Colorado* v. *United States, supra.*

(f) The Accounting Nature of the Payment under the Contract Shows that the Petitioner should be Protected from the Liability at Bar.

As used generally, and in the opinion of the Massachusetts Supreme Judicial Court (Rec. pp. 69, 70), the phrase

"fixed charge" refers to a charge which is to be paid for the use of a capital asset as distinguished from a purely operating charge. All charges not classed as "operating charges" are necessarily "fixed charges." The Interstate Commerce Commission, the supreme authority in the matter of railroad accounting (section 20 of the Amended Act; *Interstate Commerce Commission* v. *Goodrich Transit Company*, 224 U.S. 194), has repeatedly ruled that contracts such as the one involved in the case at bar do not give to the licensee any rights which can be valued under section 19*a* of the Interstate Commerce Act.

Texas Midland Railroad, 75 I.C.C. 1, at 25.
Kansas City Southern Railway Co., 75 I.C.C. 223, 235, and 248.
Danville & Western Ry. Co., 84 I.C.C. 227, at 230.
Augusta Union Station Co., 97 I.C.C. 586, at 590.

It follows from such rulings that the Interstate Commerce Commission has adjudicated that such charges as the $15,000 payment involved in the case at bar are not fixed charges. It results, therefore, that any payment made for such rights or facilities is an operating, as distinguished from a fixed, charge.

The report of the Commission which was made a part of its certificate (Rec. pp. 46, 47) made a finding as to the *operating* expenses of the branch line which included as an operating expense the $15,000 payment.

This result is confirmed by an examination of the orders of the Interstate Commerce Commission as to the calculation under section 15*a* of the Interstate Commerce Act of net railway operating income. The orders of the Commission dealing with this distinction are on file under the following dates:

Period	Date of Order
For the four months from the taking effect of the Act to December 31, 1920	Jan. 16, 1922
For the year 1921	March 16, 1922
For the year 1922	March 21, 1923
For the year 1923	March 17, 1924
For the year 1924	Jan. 21, 1925
For the year 1925	Jan. 27, 1926
For the year 1926	Feb. 4, 1927
For the year 1927	Jan. 14, 1928

Attached to the orders for the years 1923 through 1927, inclusive, are forms for use by the reporting carriers. Exhibit C of these forms, for the years 1924 to 1927 inclusive, shows in detail what items are to be deducted before the calculation of net railway operating income or deficit. The orders for the years prior to 1924 show that the rules and principles applied and the calculations made are the same as those made for the years 1924 and after, but that in the latter case more detail was required by the Commission. Included among these deductions listed on the form Exhibit C are the following account titles: "Maintaining Joint Tracks, Yards and other Facilities—Dr.," the tenth item from the bottom of page 7 of the 1928 order; "Operating joint Tracks and Facilities—Dr.," the tenth item from the top of page 8 of the 1928 order; "Joint Facility Rents (Account 541)," the third item from the end of Exhibit C on page 8 of the 1928 order.

These titles are the titles of accounts prescribed by the Interstate Commerce Commission for use in the uniform system of accounts by the railroads of the country. The accounts are all explained in two published orders of the Commission, dated May 19, 1914, and respectively entitled: "The Classification of Operating Revenues and Operating Expenses of Steam Roads," and "The Classification of Income, Profit and Loss and General Balance Sheet Accounts for Steam Roads."

For each of the account titles set out above it will be noticed from these orders of the Commission that there are two account numbers, one the debit account to be used by the paying carrier and one the credit account.

Examination of these orders of the Commission and the description and definition of the accounts therein contained shows that the above-mentioned accounts are the ones to which would be respectively charged and credited by the carriers involved payments made on account of the service covered by the $15,000 annual payment.

The only question as to the use of these accounts would be as to the distribution of the total amount paid between the various accounts. This is practically immaterial, because all the accounts mentioned appear as deductions before the calculation of "net railway operating income." They all represent operating rather than fixed charges.

However, if it is important, the apportionment made by the payee assignee in the case at bar in accordance with special instruction 9 of "Classifications of Operating Revenues and Operating Expenses for Steam Roads" is shown on Exhibit 5 (Original Exhibits, p. 1) by account numbers and amounts to be as follows:

Credit Account listed by N. Y. Central (Exh. 5)	Account Title	Amount Credited	Per Cent	Debit Acc't No.
279	Maintaining joint tracks, etc.	750.00	20	278
413	Operating joint tracks, etc.	187.50	5	412
508	Joint facility rents	2812.50	75	541

It seems from the foregoing that the $15,000 payments are operating expenses of the petitioner, Central New England Railway Company.

In this connection it must be noted that account No. 542, "Rent for Leased Road," is not included within the orders of the Commission as to calculation of *operating* income

or deficit. It follows that the account No. 542 represents a fixed charge. The definition of the account shows that it covers only payments for property which is in the complete control of the lessee. The account represents fixed payments made for capital assets as distinguished from account No. 541, which covers only payments made for the use of property without the control thereof.

It is the contention of the petitioner that the accounting nature of the $15,000 contract charge is not material to the determination of the principal question as to the legal effect, on the contract in suit, of the amended Interstate Commerce Act and action thereunder. Whatever name may be given to the item cannot affect the prime circumstances that the wherewithal to pay the charge comes from the operating revenues of the petitioner. The continuation of those payments (or the payment of the judgment rendered against the petitioner) would be a certain drain of that amount upon the petitioner's operating resources. Such a drain was exactly the type of burden on the petitioner's interstate operations which Congress intended to avoid. It follows that whether or not the item is, from an accounting point of view, a fixed or an operating expense, the recognized intention of Congress requires that the statute and certificate be protection to the petitioner in the case at bar.

It is submitted, however, that the contention of the petitioner that it is relieved from liability in the case at bar is strengthened because, as demonstrated above, the $15,000 annual payment is an operating, as distinguished from a fixed, charge. The problem as to the effect upon a lease of a railroad of the statute and a certificate and order of abandonment does not arise. The question before this Court involves only the effect upon an operating expense contract of the statute and order of the Commission. Even the Supreme Judicial Court of Massachusetts, in ruling against the petitioner, recognized that the statute and cer-

tificate covered operating expenses. That Court, however, ruled that the statute and certificate were of no avail to the petitioner as a defense because the $15,000 charge was erroneously believed not to be an operating charge.

See opinion of the Supreme Judicial Court (Rec. pp. 69, 70), particularly where it is said:

> "The end sought by the Commission in issuing the certificate, *the wiping out of the operating loss,* does not involve the removal of the fixed charge for rental." (Italics ours.)

It follows from the operating expense nature of the $15,000 payment that the statute and certificate are a defense to the suit which has been brought in the case at bar.

(g) Other Authorities and Examples Distinguished. The Question of Hardship.

Contracts dealing with interstate commerce are subject to an infirmity that Congress may legislate so as to defeat them. The parties to the contract involved at bar are presumed to know that their rights under that contract are subject to abrogation by action of Congress.

And further in the case at bar the respondent has been paid in full for all service rendered (Rec. p. 5). The branch line was constructed at the expense of the petitioner or its lessor (Rec. p. 48; Original Exhibits, pp. 14, 15). The interlocking tower and connections at Agawam Junction were built and maintained by the petitioner (Rec. p. 50). The respondent has not been put to any expense either by reason of the construction of the branch or by reason of the petitioner's cessation of operation. It follows that no hardship on the respondent exists in the case at bar. On the other hand there is great hardship on the petitioner which would pay future sums per annum as pure

tribute to the respondent for contract privileges which it was legally and physically impossible to use.

It is submitted, therefore, that the respondent's position in the case at bar is not supported by authority based on an "equitable way to adjust the matter." Such authority may be cited by the respondent in the cases of—

Louisville & Nashville R.R. Co. v. *Crowe*, 156 Ky. 27; 160 S.W. 759—

and—

New York Central R.R. v. *Gray*, 239 U.S. 583.

The *Crowe* case was brought in equity by one who had deeded a right of way to the railroad in consideration of an annual pass. The Interstate Commerce Act amendment of 1906 stopped the issuance of such passes. Demurrer was overruled on the authority of the *Mottley* case and judgment for $200 rendered on the pleadings. The *Kentucky* case cites no authority for its conclusion, and gives as reasons that "the equitable way to adjust the matter" is to require the railroad to pay for the right of way purchased and necessarily retained, taking into consideration what appellee has already received and that "some other medium of payment should in good conscience be substituted for the medium which is no longer available."

It is submitted that such a decision can have no effect upon the case at bar, which is an action at law in which the plaintiff respondent has been fully compensated for all service rendered.

It is further submitted that the Supreme Court of Washington has reached the more accurate result in its careful opinion in *Crowley* v. *Northern Pacific Railway*, 68 Wash. 588, which was a case involving the same facts as *Louisville & Nashville Railroad Co.* v. *Crowe*, *supra*, but an even greater degree of hardship. In that case the plaintiff and his wife in 1898 conveyed a tract of land in Spokane to the defendant for annual passes during his life. The

defendant performed until the passage of the Commerce Act of June 29, 1906, after which it refused to perform. The value of the property at the time of the conveyance was $15,000 and at the time of the action it was $200,000. The action was to rescind or have damages, the *Mottley* case (219 U.S. 467) being conclusive as to no specific performance. Rescission was denied because of changed circumstances. A judgment for damages was reversed and judgment entered for the defendant because full performance had been arrested "by the Congress of the United States acting within its constitutional powers."

New York Central R.R. v. *Gray, supra*, was a case in which an architect had prepared plans and rendered service for the railroad which had promised to give him an annual pass. The action for damages, after the 1906 Interstate Commerce Act amendment, was allowed on a *quantum meruit* basis. The decision rests upon the restoration of consideration past due and has no reference to the question in the case at bar of rights *in futuro*.

This *Gray* case and *Louisville & Nashville R.R. Co.* v. *Crowe, supra*, can be regarded as nothing more than attempts, because of hard situations, to get away, on an equitable basis, from the clear law that a subsequent Act of Congress which excuses or prevents performance is a complete defense. Such a doctrine can apply to the case at bar only in favor of the petitioner, because anything further received by the respondent would be in the nature of a penalty paid by the petitioner for compliance with the certificate and order of the Commission.

In the case at bar argument is made that an order of the Commission could not affect a promise to pay interest, and so the petitioner's obligation on the contract of 1899 cannot be affected. We submit that Congress could affect a railroad's promise to pay interest, and under the amended Interstate Commerce Act that result can practically be accomplished by regulation of rates and valuation of

property. Wherever obligations of carriers relating to interstate commerce interfere with the efficient execution of the activities of Congress under the commerce clause those obligations must fall and even without compensation to a person affected thereby.

Union Bridge Co. v. *United States*, 204 U.S. 364, at 401.

Houston East & West Texas Ry. Co. v. *United States*, 234 U.S. 342.

Delaware, Lackawanna & Western R.R. Co. v. *United States*, 231 U.S. 363.

Greenleaf Johnson Lumber Co. v. *Garrison*, 237 U.S. 251.

Louisville Bridge Co. v. *United States*, 242 U.S. 409, at 421.

Furthermore, the analogy suggested can have no weight because the obligation of the defendant under the contract (Exhibit 3) is not a general obligation to pay, but only a promise to pay, limited by force of the "whereas" clause and the language of the agreement to the existence of the branch connection from the south. The purchaser of this obligation can see this possibility on the face of the contract which by its nature is subject to the infirmity of Congressional action, so that when there is action which results in the non-existence of the branch connection there is no difficulty about excusing the defendant, whose obligation to pay was not general but distinctly limited to the existence of that branch.

Recent decisions of the Interstate Commerce Commission showing the extent to which the Commission has acted under paragraphs 18 to 22 of section 1 of the Transportation Act in relieving carriers of the burdensome obligations of special contracts are:

Control of Hereford Railway, 99 I.C.C. 7.

Abandonment of Branch Line by New York, New Haven & Hartford R.R., 82 I.C.C. 45.

The second of these two cases is helpful because it shows (82 I.C.C. 46) that upon the issuance of a certificate of abandonment the carrier authorized would, by force of the statute, be relieved from burdensome obligations under mortgages.

The question before this Court concerns only the effect on the agreement of October 25, 1899, of the amended Interstate Commerce Act and action thereunder. The question of the effect of the statute upon the lease of the Hartford & Connecticut Western to the petitioner is not involved and has no bearing on the decision of the case at bar. The nature of that *lease* is quite different from the nature of the *license* or *trackage contract, Exhibit 3.* The lease involves the transfer of exclusive possession and control of the property. The payment of rent thereunder is a fixed charge. Abandonment of the line from Feeding Hills to Agawam Junction does not change the petitioner-lessee's possession and control of the property. The petitioner remains in possession of and operating the extensive property leased to it by the Hartford & Connecticut Western.

The contract, on the other hand, gave the petitioner only a very limited right to a regulated use. The payments thereunder were operating charges. The prescribed use of the tracks was premised upon and was impossible without the operation whose abandonment was authorized by the Commission. The lease of the Hartford & Connecticut Western to the petitioner is not involved in efficient execution of the action authorized by the particular order entered by the Commission.

As noted above, the case at bar concerns only the effect on private contracts of Congressional legislation under the commerce clause of the Constitution. By the particular

legislation involved Congress has thoroughly occupied the field. The numerous authorities cited on pages 16 to 19 of this brief and dealing with the interstate commerce legislation are the authorities which control the situation at bar. Cases involving state statutes are no authority for the interpretation of Federal legislation under the Constitution, particularly as the decisions of this Court involving such statutes carefully refrain from giving any decision of the precise question of liability for damages involved here. *Ortega Co.* v. *Triay*, 260 U.S. 103, and *Armour Co.* v. *Dallas*, 255 U.S. 280, cannot, therefore, be considered as helpful authority in the case at bar.

It should be noted that, although the petitioner contends that the amended Interstate Commerce Act and the certificate and order of the Commission issued thereunder are a complete defense to the action brought, the record (pp. 29, 30, 36, and 37) raises the question as to whether or not the statute and certificate of the Commission had any effect on the petitioner's obligation. It is therefore open to this Court to limit or define the extent of protection given to the petitioner. And in so doing, this Court may examine for itself and determine the nature of the contract sued on and the facts alleged to bar the claim of right under the Federal Statutes asserted by the petitioner. See *Railroad Comm. of Texas v. Eastern Texas R.R. Co.*, 264 U.S. 79, at 87.

5. The Opinion of the Supreme Judicial Court of Massachusetts.

The opinion of the Supreme Judicial Court of Massachusetts dismissing the petitioner's exceptions assumed (Rec. p. 67) that Congress, in enacting paragraphs 18 to 20 of section 1 of the amended Interstate Commerce Act, authorized the Commission to sanction the abandonment by an interstate carrier of a contractual obligation such

as existed in the case at bar. Having made this erroneous assumption the Massachusetts Court decided that the Commission had not exercised its authority sufficiently to protect the petitioner, because it did not appear clearly that the Commission intended to deprive the respondent of its rights under the agreement with the petitioner (Rec. p. 69).

The Massachusetts Court then proceeded to draw support for its view of the Commission's intention from the facts:

(*a*) That the respondent was not a party to the proceeding before the Commission;

(*b*) That the application of the petitioner had been submitted to the Commission "without a formal hearing"; and—

(*c*) That it was not to be supposed that the Commission intended to adjudicate the $15,000 annual payment as an operating charge of the petitioner, it being the Massachusetts Court's suggestion that the annual $15,000 could have been found to be a fixed, and not an operating, charge (Rec. p. 69).

The learned Supreme Judicial Court is in error as to the possibility of the $15,000 charge being classed as a "fixed charge," because, as demonstrated on pages 33 to 38 of this brief, such a charge has been generally and specifically held an operating charge by the Commission and the parties. The authorities cited (Rec. pp. 69-70) by the Masachusetts Court in support of its suggestion are not in point, for they contain no discussion of the problem, which did not arise directly, and they were decided either before or without reference to the powers of the Interstate Commerce Commission over the accounting of carriers. It is submitted, therefore, that on this question of the nature of the annual payment the Massachusetts Court is without support.

And, furthermore, the Massachusetts Court erred in holding that the specific intention of the Commission as to the particular contract was material to the problem. The Court entirely overlooked the fact demonstrated on pages 30 and 31 of this brief that the effect of the amended Interstate Commerce Act on private contracts is the effect of the Act and intention of Congress rather than of the Commission, so that the specific intention of the Commission as to any particular contract is immaterial. As shown above, in sections 2 and 4 (*d*) of this brief, the Commission administers the provisions of the statute, and exercises its judgment on certain delegated problems, and, that judgment being exercised in accordance with the statutory provisions, the effect on related contracts is the effect of Congressional action.

It follows that the fact that the application was submitted "without a formal hearing" cannot be used to support a lack of intent which is not involved in an application of the statute. And, furthermore, this fact cannot properly be used as indicative of the Commission's action, because the petitioner complied with all provisions of the statute. The proceeding before the Commission was proper. Prior to the cessation of operation the respondent had notice and a full opportunity to go before the proper tribunal (see p. 32 of this Brief).

> *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 49.

These errors naturally developed from the erroneous original assumption made by the Court, that the Commission had power to directly sanction the abandonment of an *obligation* (Rec. p. 67). This assumption was apparently made as being the first step in determining the effect of action by the Commission. It is erroneous because, under paragraphs 18 to 20 of section 1, the Commission deals primarily with abandonment of lines of railroad. The

Commission does not abrogate contracts; the Act of Congress does that. By force of the statute contracts involved in an operation whose abandonment is authorized by the Commission are modified or abrogated with impunity to the extent necessary for an unhampered accomplishment of the recognized purpose of the legislation.

The recognized purpose of Congress was to build up and ensure a national transportation system. The protection of that purpose becomes particularly and immediately effective whenever the Commission exercises its judgment on the facts presented and rules that public convenience and necessity permit or require something. The Commission administers the purpose of Congress so as to permit the owners of the railway properties to earn enough to adequately serve the public.

Dayton-Goose Creek R.R. v. *United States*, 263 U.S. 457.

It follows that the true analysis of the situation at bar is that the petitioner is protected from the liability sought to be enforced against it because that liability arose from an operation which was a burden on interstate commerce and the abandonment of which was authorized by the Commission in the interests of interstate commerce.

6. The Congressional Purpose would be Nullified by the Enforcement against the Petitioner of the Liability Involved in the Case at Bar.

In a case of a carrier's operation of a branch line under such an agreement as existed in the case at bar, it might very well be that the carrier, by continuing operation of the branch, would only lose, including payment of a $15,000 contract charge, $5000. Under such circumstances, if the Commission issued a certificate and order authorizing abandonment, and the carrier relied on the order and ceased operation only to face a liability for damages at the

full contract rate of $15,000 a year, it would appear clearly that the Commission's certificate and order had been absolutely ineffective in protecting from a burden the interstate operations of the carrier authorized. This result is contrary to the purpose and intent of the legislation, and would greatly hamper and restrict the efficient execution of the power of Congress. It follows that in such a case the carrier authorized would be protected from liability on the contract.

The contract relation is the same in the case at bar, where the carrier happens by operation to be losing more than the full contract charge. The difference in circumstances cannot affect the application of the statute, because those circumstances are all matters for the Commission to consider in the exercise of its judgment as to the issuance of a certificate. An unconditional certificate having issued, the circumstances of the particular operation have no proper effect upon the legal relation between the operating contract and action taken by virtue of the Commission's order. The same principle, therefore, which clearly protects the carrier in the $5000 case above suggested, requires that the petitioner at bar be free from liability.

If liability for payments at the rate of $15,000 a year is to continue, the certificate of abandonment has been no relief to the interstate operations of the petitioner, and the very purpose of the Congressional action is defeated. It results, therefore that a certificate and order of authorization by the Commission should protect the carrier authorized from liability necessarily and directly resulting from an efficient execution of the abandonment of an operation which was a burden on interstate commerce and which was authorized by the Commission in the interests of interstate commerce.

Texas v. *Eastern Texas R.R.*, 258 U.S. 204; 264 U.S. 79.

Colorado v. *United States*, 271 U.S. 153.

Furthermore, if a carrier is not free from a civil liability necessarily consequent upon action authorized by the Commission to relieve a burden on interstate commerce, it will mean that the carrier will be hampered and thwarted in carrying out its part in the development of the national system.

Congress intended the legislation to develop and ensure a national transportation system and to relieve burdens from the performance by carriers of their interstate duty. If the liability for damages involved in the case at bar is enforced agninst the petitioner, it will mear nothing more than that the petitioner's operations are to be subject to a burden of pure tribute to the respondent.

Such a result would certainly thwart the "fostering guardianship and control" of the Commission, for the judgment of other persons would be substituted for that of the Commission. It would render ineffective, as one of the means by which the Congressional purpose is to be achieved, the paragraphs 18 to 20 of section 1 of the amended Interstate Commerce Act. It would nullify the recognized purpose of the Congressional legislation.

Texas v. *Eastern Texas R.R., supra,* at 216.
Colorado v. *United States, supra.*

It follows that the statute should be construed in line with the recognized Congressional purpose and authorities, so as to avoid nullification, and therefore include protection for the petitioner in the case at bar.

If the agreement in the case at bar was one which required the petitioner to operate its trains into Springfield, the *Colorado* case (271 U.S. 153) is conclusive that the respondent could not have specific performance of that agreement. In such a case the petitioner would be protected from the obligation to perform because performance entailed a burden on its other interstate operations, relief from which, in the building up of the national system, the

Commission found was permitted by public convenience and necessity. The *obligation* of the contract to perform was subject to an infirmity that Congress might legislate with respect thereto. By the passage of the amended Interstate Commerce Act Congress did so legislate and unequivocally expressed its intention that a carrier be relieved of a contract for operation creating a burden on interstate operations when the Commission certifies that public convenience and necessity permitted the abandonment of that operation. The opinion of this Court in the *Colorado* case covered exactly this case (271 U.S. 153, at 165). The opinion in the *Texas* case carefully provided for it (258 U.S. 204, at 216).

Now it cannot be supposed that the Congressional power to legislate with respect to interstate commerce is so limited that, although it will protect from an obligation to perform, it will allow damages, the law's inadequate substitute for performance. If damages were allowed in lieu of the specific performance which could not be had, it is obvious that there would be no relief to the interstate operations of the respondent. The allowance of damages would nullify the effect of the Congressional action. It must be that the amended Interstate Commerce Act in a proper case protects a carrier from damages as well as from an obligation to perform.

Assuming, as above suggested, that an obligation to operate into Springfield did exist in the case at bar, it has been rendered unenforcible, and the petitioner would not be liable in damages. *A fortiori* the petitioner is protected from liability for damages in the case at bar.

The liability sought to be enforced against the petitioner in the case at bar arises from a contract which the Commission found to be a burden on the petitioner's interstate operations. The petitioner could not possibly use the privileges of the contract after taking the specific action authorized by the Interstate Commerce Commission.

Future payments to the respondent would be received for no service rendered or expense incurred. Clearly, the Congressional purpose protects the petitioner from the liability at bar which is incidental to the relieving of its interstate operations from a burdensome operation.

We therefore submit that the petitioner should be protected in this action for damages because—

1. Private contracts dealing with interstate commerce are subject to an infirmity that Congress may act thereon.

2. Congress has acted with broad scope and purpose to build up a national transportation system, and has passed the Transportation Act of 1920.

3. Authority and reason show that the legislative action of Congress and the Interstate Commerce Commission are sufficient in scope to relieve the petitioner's interstate operations from the burden of the contract from which has arisen the liability sought to be enforced in the case at bar.

II. There was No Jurisdiction in the Massachusetts Courts to Hear the Cause.

Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission can be brought only in the Federal District Court. The jurisdiction of the District Court in such cases is exclusive. This results from the fact that this jurisdiction, vested in the Commerce Court by section 207 of the Judicial Code of March 3, 1911, was transferred by Act of October 22, 1913, to the District Courts.

Act of March 3, 1911, c. 231, sec. 207; 36 U.S. Stat. at Large, 1087.

Act of Oct. 22, 1913, c. 32; 38 U.S. Stat. at Large, 219.

United States Comp. Stats. 1916, secs. 992, 993, 997, 998.

28 U.S. C.A. 41 (27-28 and footnote); 28 U.S. C.A. 46.

The motion to dismiss is not affected by the fact that it may not appear on the face of the pleadings that the suit is essentially one to annul or suspend in whole or in part an order of the Commission. When, by filing of the motion or during the trial, it does develop that the suit is essentially for that purpose, the motion to dismiss should be allowed for want of the Court's jurisdiction over the subject-matter and the lack of the United States as a party.

Lambert Run Coal Co. v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377.

It is not necessary that the suit expressly seek to annul or set aside an order of the Commission. It is enough to bring the action within the exclusive jurisdiction of the Federal District Court that it is sought to prevent the petitioner from doing what the order authorizes, because that is equivalent to asking that the order be adjudged invalid.

Venner v. *Michigan Central R.R. Co.*, 271 U.S. 127.

Illinois Central R.R. Co. v. *State P.U. Comm.*, 245 U.S. 493, 504, 505.

North Dakota v. *Chicago & Northwestern R.R.*, 257 U.S. 485.

State of Louisiana v. *Morgan's Louisiana & T.R. & S.S. Co.*, 18 F. (2d) 645.

The case at bar is on all fours with the above four cases except that they were bills in equity to enjoin or nullify orders of the Commission and the instant case is a suit at law whose inevitable result must be to nullify and suspend at least in part an order of the Commission by putting upon the petitioner one of the very burdens which was found by the Commission in the proceeding before it.

The substance of the respondent's argument in the case at bar rests on the claim that the Commission's order has no application to the agreement sued on. The attempt is to limit the application of the order, suspend its operation as against the agreement sued on, and annul its effect to a certain extent.

The facts and figures of the situation were before the Commission in the proceedings for the order authorizing abandonment. Upon the whole question the Commission acted, and the respondent cannot in a state Court suspend or annul that action. The tribunal for determination of such matters is prescribed by the United States statutes referred to above. The respondent would, in the case at bar, have the state Court determine the effect and interpretation of action taken under a Federal statute on interstate commerce, a matter confided by the United States Constitution to Congress and on which Congress has fully acted. It is just that sort of case that is properly brought only in the Federal District Court.

> *North Dakota* v. *Chicago & Northwestern R.R.*, *supra.*
>
> *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, *supra.*

The permissive nature of the order makes no difference so far as this question is concerned.

> *Chicago Junction Case*, 264 U.S. 258, and cases cited.

Either this certificate and order of the Interstate Commerce Commission is a complete defense to this action for damages, or else the action becomes a suit to annul in part the effect of the order and the purpose of its issuance.

The petitioner's amended motion to dismiss should therefore have been allowed on the fourth ground (Rec. p.

45), because the action brought must inevitably be a suit which would directly or indirectly annul or suspend, at least in part, the order of the Interstate Commerce Commission entered in Finance Docket 1479.

III. Conclusion.

The petitioner therefore contends that a mandate should issue from this Court ordering judgment to be entered for the defendant by the Superior Court of Massachusetts. That Court has denied to a certificate of the Interstate Commerce Commission any effect whatsoever. The recognized legislative purpose will be nullified unless the Commission's certificate accomplishes protection to persons acting thereunder.

Congress, acting under the commerce clause of the Constitution with a recognized broad purpose, passed the Transportation Act of 1920.

The Interstate Commerce Commission issued a legislative order which specifically authorized the petitioner to abandon a line of railroad. Operation of that line was a burden on other interstate operation. The petitioner, in pursuance of the mandates of the Transportation Act (see section 15*a* (2) and (3)), abandoned the line. The abandonment of that line involved the petitioner's ceasing operation into Springfield and the use of the tracks covered by the contract sued on. After the abandonment it was physically and legally impossible for the petitioner to operate under the contract. The petitioner should therefore, as matter of law, by force of the Acts of Congress, be protected from liability on the contract in a suit, such as the one at bar, brought as a direct result of action taken in efficient execution of the Commission's order.

JOHN L. HALL,
MARCIEN JENCKES,
Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 532.

CENTRAL NEW ENGLAND RAILWAY COMPANY,
PETITIONER,
v.
BOSTON & ALBANY RAILROAD COMPANY, ASSIGNOR FOR THE BENEFIT OF THE NEW YORK CENTRAL RAILROAD COMPANY, ASSIGNEE,
RESPONDENT.

ADDITIONAL BRIEF FOR THE CENTRAL NEW ENGLAND RAILWAY COMPANY.

This additional brief is submitted by the petitioner for the purpose of bringing to this Court's attention that the general nature and particular provisions of the agreement of October 25, 1899, on which was brought the case at bar, show the agreement to be of such a nature that the petitioner should be protected from the liability imposed upon it.

THE AGREEMENT IS SUBJECT TO AN INFIRMITY THAT CONGRESS MAY LEGISLATE WITH RESPECT THERETO.

The agreement was between two interstate carriers. The particular provision on which rests the respondent's claim was in reality a fixing by the parties to it of a rate to be

paid for services rendered over a period of years. Whether the agreement was a contract or a license, as it is described by the respondent, the fact remains that in its essence it was a permission granted to the petitioner to use the tracks of the respondent and to pay for that use at a definite price. Fundamentally the agreement was a regulation of transportation expense by the parties thereto. It was the fixing of a definite price for the operating of trains in commerce between the states. It was an attempt on the part of the carriers themselves by agreement to regulate interstate commerce. As such a regulation, it is elementary that the contract is subject to an infirmity that Congress may legislate with respect to it even to the extent of relieving parties from obligations imposed by it. The parties to this contract, being interstate carriers, clearly must have had in their minds at the time of making the contract this infirmity which is created by the interstate commerce clause of the Federal Constitution. It is submitted, therefore, that the rate regulatory nature of this agreement directly involving interstate commerce is such that authority and cases applicable to an ordinary contract between private parties are not in point.

This view of the agreement or contract or license itself runs throughout the case and can never be disregarded. It distinguishes the situation in the case at bar from all other cases.

The parties understood, and the Interstate Commerce Commission has ruled, that the $15,000 annual charge imposed by this contract was an operating, as distinguished from a fixed, charge (see pp. 32 to 38 of the petitioner's brief). Operation of the line whose abandonment was authorized necessarily involved the payment of this charge. Without operation of that branch, payment of the charge is a payment by way of pure tribute for absolutely no service rendered. After the abandonment it was physically and legally impossible for the petitioner to operate. Pay-

ment for all past services rendered had been made. Future payments, which were the only subject of the suit at bar, would really be a penalty paid by the petitioner to the respondent for services which the respondent could not render and the cessation of which put no expense upon the respondent.

Decision of the case at bar in favor of the petitioner does not involve any doctrine as to the effect of the amended Interstate Commerce Act upon leases, mortgages or other claims. The only question before the Court, and the only question involved in the case at bar, is the effect of that statute and action thereunder upon the particular contract in suit. The nature of that contract is quite different from the nature of a lease or mortgage (see pp. 42, 43 of the petitioner's brief). The intention of Congress as to them may well differ from its intention as to an operating trackage agreement such as the one at bar.

It is immaterial that the Massachusetts Courts have held the agreement sued on to be of such a nature that the respondent is a creditor of the petitioner, because that question is one of law under the Federal Constitution and statutes. It is the very question now before this Court. The authorities cited on pages 24 to 28 of the petitioner's brief and in this additional brief show that this Court has already recognized the intention of Congress so to legislate with respect to such an agreement as the one at bar that the petitioner is protected in the action which it took and is therefore not a debtor to the respondent. The argument of the respondent's supplemental brief rests upon the theory that the respondent is a creditor by decision of the Massachusetts Courts and therefore is not affected by Congressional legislation. The argument is unsound because it erroneously assumes that the respondent is a creditor when the decision of that question, in view of the legislation under the commerce clause, is the one now before this Court.

Particular Provisions of the Agreement Show the Petitioner should be Protected.

It is not helpful to attempt to classify categorically the agreement and then to arrive at a solution as to the rights and liabilities of the parties on the basis of that classification. The agreement itself is the determining factor, and whether it is called a contract or a license makes no difference. That the privilege covered thereby is deemed irrevocable is unimportant. The essential question is whether the amended Interstate Commerce Act and action thereunder protect the petitioner from liability on the agreement. It is submitted that the various provisions of the agreement noted below show clearly that the contract is of such an operating nature that the petitioner should be protected by the legislative action of Congress and the Commission.

(*a*) The sixth paragraph of the agreement which deals specifically with payments by the petitioner provides only for making payments required in accordance with the terms. There is no provision or term of the agreement that the $15,000 be paid irrespective of operation.

(*b*) Quarterly payments were to be made. They, of all means of payment, would be most commensurate with operation. The payments were to begin only with use at an indefinite time (*i.e.*, the opening of the branch line for regular trains), they were to continue on quarterly dates if the license was used and they were to cease, not at the end of a quarter or when any certain sum has been paid, but, with operation, in the middle of a quarter on August 30, 1940.

(*c*) The word "therefor," as it appears after "paying to the Albany Company" in the sixteenth line of the first paragraph of the agreement, naturally refers back to the phrase "to pass with trains and locomotives over the lines," and indicates that the money was to be paid only

for operation, *i.e.*, when trains passed over. The whole phrase when stripped of unnecessary words is "to license and permit the Central New England Railway Company to pass with trains over the line of the Albany." The agreement covered operation, and when that operation ceased in accordance with Congressional action no further payments should be made.

(*d*) The "whereas" clauses of Exhibits 3 and 28, and the fact that the respondent acquired no right to independent operation from Agawam Junction to Springfield, show clearly that the agreement was entirely dependent upon the construction and operation of the line of the petitioner from the south to Agawam Junction. When with Congressional sanction that line ceased to exist, the opportunities and privileges provided for by the agreement would naturally cease to have any purpose.

(*e*) The provision of paragraph first for compensation to the Boston & Albany, if the daily average number of trains exceeds six, requires additional payments in the proportion in which the additional trains exceed six, so that the petitioner is obliged to pay $2500 per train for those in excess of six when and if it runs those trains and uses the facilities. The payments for passage with trains are operating payments for service and facilities. The annual $15,000 payment was for such service and facilities for up to six daily trains in both directions.

(*f*) By paragraph three the respondent, if the petitioner used the privileges and facilities mentioned in the agreement, is under obligation for the prescribed $15,000 annual payment to sell tickets, handle baggage, take care of passenger trains in its passenger yard and transfer through passenger cars to connecting lines. These are services compensation for which was to be received from the fifteen thousand dollar payments. They are services of a distinctly operating nature, for without the existence of the

line there would be no occasion for these services. The provision of the first paragraph as to sharing in the expense of maintaining water stations is based entirely upon compensation for actual use. The same is true of the provision as to the use of engine house stalls. The entire agreement is based on payment by the petitioner for service rendered or use received during operation. The words which deal with the fifteen thousand dollar item are in harmony with the whole contract.

It is therefore submitted that the terms of the particular agreement involved in the case at bar show it to be of such a nature that it is clearly within the recognized scope of the amended Interstate Commerce Act. It follows that the respondent cannot collect from the petitioner a sizeable penalty for action taken by the petitioner under and in pursuance of that Act.

This analysis and examination of the provisions of the contract with a view to determining its nature and the relation of the Congressional legislation and action thereunder is clearly within the province of this Court.

> *Railroad Comm. of Texas* v. *Eastern Texas R.R. Co.*, 264 U.S. 79, and cases cited therein at page 84 (see petitioner's brief, p. 43).

Cases in this Court and from England relied on by the respondent to show that the agreement should be catalogued as an irrevocable license so that it cannot be affected by action of Congress are not in point. Two cases in this Court, *Union Pacific Railway Co.* v. *Chicago &c. Ry. Co.*, 163 U.S. 564, and *Rock Island Ry. Co.* v. *Rio Grande Ry. Co.*, 143 U.S. 596, were cases involving agreements containing elaborate "whereas" clauses by which the railroad in the position of the respondent in the case at bar did let the other party to the contract into "full, equal, joint and perpetual possession and use" of certain tracks and build-

ings. The contracts also contained provisions that the rights thereof should attach and run with the railways of both parties during their corporate existence. There is nothing in the agreement involved in the case at bar which could be construed to have the same effect as these provisions of the contracts construed in the above cases. That language was vital to the result of those cases. It follows that those cases are no authority in connection with the relation of the amended Interstate Commerce Act and the agreement involved in the case at bar.

The same situation is true with respect to the English cases of *Great Northern Railway Company* v. *Manchester, Sheffield &c. Railway Company*, 5 DeGex & S.M. 138, and *Llanery Ry. & Dock Company* v. *London N.W. Railroad Company*, L.R. 8 Ch. Apps. 942; 7 H.L. 550, referred to on page [illegible] of the respondent's supplemental brief, because those decisions relied upon terms of the agreements involved which do not exist in the contract in the case at bar. Those English cases are really authorities in favor of the petitioner because it was indicated that without the special terms, which showed a much greater transfer of possession and control than under the agreement at bar, a contrary result would have been reached.

Furthermore, these and the other authorities relied on by the respondent on pages [illegible] to [illegible] of its supplemental brief are inapplicable, because, as noted above, it is unimportant that the privileges covered by the agreement are deemed irrevocable.

In this connection the attention of the Court is called to an improper interpretation by counsel for the respondent on pages [illegible] and [illegible] of its supplemental brief of the petitioner's argument on pages 41 and 42 of its brief. Two opinions of the Interstate Commerce Commission are there referred to by the petitioner as showing action of the Interstate Commerce Commission under paragraphs 18 to 22

of section 1 of the amended Act. The context of the petitioner's brief shows that the reference to these reports was only to show that the Commission itself had used language indicating that the action of Congress was sufficiently broad to accomplish the modification of "burdensome obligations *under* mortgages" (italics ours). In its brief the petitioner made no general contention with regard to the effect of the Congressional legislation and action thereunder upon "such obligations as mortgages." That question is not involved in the case at bar. It is unnecessary for the petitioner or the Court to take any position with respect to it.

On the basis of this argument the respondent states that the petitioner's contention extends "to such burdensome obligations *as* mortgages" (italics ours). It is respectfully submitted that the language of the petitioner's brief "burdensome obligations *under* mortgages," which is taken from the report of the Interstate Commerce Commission (82 I.C.C. 46), does not mean what the respondent seeks to make it mean.

Argument cannot be made against petitioner's position on the theory that the petitioner itself voluntarily created a situation which has resulted in the non-performability of the contract because Congress and the Commission representing and acting for the public and interstate commerce as a whole have taken the action under which the petitioner claims protection. Because of this legislative sanction the petitioner, in acting thereunder, is not to be prejudiced by reason of its initiative in obtaining that sanction (see pp. 29 and 30 of petitioner's brief). Indeed, the mandate of section 15a of the amended Act left the petitioner no alternative but to abandon what it could operate only as a heavy drain on its other operations (see pp. 25 and 29 of petitioner's brief).

Conclusion.

The agreement of October 25, 1899, Exhibit 3, on which suit has been brought, was an agreement involving interstate commerce which was essentially a regulation by the parties of the cost of operation in interstate commerce. The parties must be held to have made the agreement with a view to the infirmity that Congress might legislate under the commerce clause to affect the obligations or liabilities of parties to it. Congress has acted in this connection and passed the amended Interstate Commerce Act. The Interstate Commerce Commission has acted in a proceeding under the provisions of the statute and issued a certificate authorizing the abandonment of a line of railroad whose continued operation was a burden on the interstate operations of the petitioner. The petitioner's liability in this case represents a payment, necessarily incidental to the operation of the line abandoned, which was found by the Commission to be a part of the operating burden of that line. After the abandonment so authorized it was legally and physically impossible to operate under the agreement. The agreement of October 25, 1899, Exhibit 3, is clearly of such a nature that it is within the scope of the Congressional enactment and action thereunder. It follows as matter of law that the recognized Congressional purpose protects the petitioner from the liability involved in the case at bar.

New York v. *United States*, 257 U.S. 591.
Texas v. *Eastern Texas R.R. Co.*, 258 U.S. 204.
New England Divisions Case, 261 U.S. 184.
Colorado v. *United States*, 271 U.S. 153.

JOHN L. HALL,
MARCIEN JENCKES,
Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No.

CENTRAL NEW ENGLAND RAILWAY COMPANY,
Petitioner,

v.

BOSTON & ALBANY RAILROAD COMPANY, ASSIGNOR FOR THE BENEFIT OF NEW YORK CENTRAL RAILROAD COMPANY, *Assignee, Respondent.*

BRIEF FOR THE RESPONDENT.

The petitioner seeks a writ of certiorari to review a judgment of the Superior Court for the County of Suffolk, in the Commonwealth of Massachusetts, rendered against the petitioner July 30, 1928, pursuant to a rescript from the Supreme Judicial Court, in an action of contract in which the respondent is plaintiff and the petitioner defendant.

The contention of the respondent in this brief is that there is nothing in the proceedings in said action that calls for such review.

The case disclosed by the record may be briefly stated as follows:

The Central New England Railway Company, a corporation organized under the laws of the State of New York at some time between May 9, 1898, and October 25, 1899, became the lessee of the Hartford & Connecticut Western Railroad Company, under a lease the term of which ran to August 30,

1940. By Chapter 386 of the Special Acts of the Massachusetts Legislature for the year 1889, the Hartford & Connecticut Western Railroad Company, a Connecticut corporation, was authorized to extend its road into Massachusetts (Record, p. 29). Under this authority, said lessor in 1899 commenced the construction of a branch line from Tariffville, Connecticut, to a point on the line of the Boston & Albany Railroad, at Agawam, in Massachusetts. On October 25, 1899, while said branch was being constructed, the Central New England Railway Company and the Boston & Albany Railroad Company entered into the trackage agreement which is the basis of the action which petitioner asks this court to review. This agreement is set out by copy as "Exhibit 3" (Record, p. 47). It obligated the Boston & Albany Railroad Company to continue the trackage rights specified in the agreement to August 30, 1940, which, it will be observed, was the date when the term of the lease of the Hartford & Connecticut Western Railroad Company to the Central New England Railway Company would expire. The trackage agreement secured to the latter company the right to operate its freight and passenger trains over the tracks and in the yards, engine houses and station of the Boston & Albany Railroad Company during the entire period named, with the right to use other facilities as required. The tracks over which this trackage right was granted were those from Agawam Junction to Springfield, there to connect with the Boston & Maine Railroad and the New York, New Haven & Hartford Railroad Company, as well as with the Boston & Albany. While there was a fixed price of $15,000 per annum for this right if the trains did not exceed a certain number per day, there appears to be no limit to the number of trains the Central New England Railway could run, with a proportionate advance in the price. There were other provisions for compensation in the agreement, which, unlike the fixed sum above named, depended upon the extent of the service rendered.

The branch line built by the Hartford & Connecticut West

ern Railroad Company was completed, so that the Central New England Railway Company began to operate trains over it on September 15, 1902. Between the date of the trackage agreement aforesaid (October 25, 1899) and the date when such operation began, the Boston & Albany Railroad Company had leased its entire line to the New York Central & Hudson River Railroad Company, the lessee succeeding to all rights and assuming all obligations under said agreement. Later in 1914, by consolidation, the New York Central & Hudson River Railroad Company became a part of the New York Central Railroad Company, which in turn succeeded to all rights and assumed all obligations of the Boston & Albany Railroad Company under said agreement. Neither of these transactions caused the Central New England Railway Company to suspend the exercise of its trackage rights under the agreement, and it continued to exercise them until December 15, 1921, making all payments that fell due under the terms of said agreement up to that date. It will also be observed that in its proceedings before the Interstate Commerce Commission, hereinafter referred to, the Central New England Railway Company, in referring to this trackage agreement, said, "This agreement is in force at this date" (Original Exhibits, p. 16), and that in the stipulation for omissions from the record for the purposes of this proceeding it was agreed that the petitioner's petition for certiorari "does not present and is not intended to present any question as to the legal execution and validity of the contract in suit except as it may be claimed to have been affected by the order of the Interstate Commerce Commission issued September 8, 1921, nor any claim that the plaintiff and its assigns have failed to perform said contract so far as it and they were permitted by the defendant to perform it" (Record, p. 81). The only effect that these transactions have had is that, in accordance with state procedure, the plaintiff was required to amend its writ in the action at law by substituting the Boston & Albany Railroad Company, Assignor, as plaintiff in place of the New York Central Railroad Company, upon the technical ground

that only the party named in a sealed instrument could sue upon it.

On June 15, 1921, the Central New England Railway Company filed with the Interstate Commerce Commission its application "for a certificate of public convenience and necessity under Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, permitting the abandonment of operation of its line between Feeding Hills, Massachusetts, and Agawam Junction, Massachusetts" (Original Exhibits, p. 12). It will be observed that the line the operation of which is sought to be abandoned is but a small portion of the line from Tariffville to Agawam Junction, which was being constructed by the Hartford, Connecticut and Western Railroad when the trackage agreement above referred to was executed. That line was 14.35 miles in length, being partly in Connecticut and partly in Massachusetts, and Feeding Hills was an intermediate station on that line. The portion for which abandonment was sought was 1.87 miles and lay wholly in Massachusetts (Original Exhibits pp. 15 and 35). It will also be observed that while the application states that the applicant proposes "in addition to abandon the operation of its trains between said junction and Springfield, Massachusetts, over the tracks of the Boston & Albany Railroad," it does not ask for any certificate or order covering that proposed additional abandonment (Original Exhibits, p. 12). Confining itself within the scope of the application, the certificate and order of the Commission in terms went no further than to permit "the abandonment by the Central New England Railway Company of its line of railroad extending from the station at Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad" (Original Exhibits, p. 36).

It is further recited in this application, presumably as reasons for granting it, that "applicant's lines are operated as a part of the system of the New York, New Haven and Hartford Railroad Company, and all freight on said Tariff-

ville branch destined to and from Springfield and beyond can be handled over applicant's main line and the New York, New Haven and Hartford Railroad via Hartford, Connecticut." It does not appear to be stated definitely when the applicant began to be operated as a part of the New Haven system, but it does appear that the New Haven interjected itself into the situation as early as October 28, 1914 (Record, p. 22).

It appears that notice of the foregoing application was given by publishing a copy of it in the *Springfield Republican* on June 24, July 1, and July 8, 1921 (Original Exhibits, pp. 14 and 32).

The only evidence that appears to have been before the Commission (unless the allegations of the application are regarded as evidence) was contained in the written questions put to the applicant and the written replies of the applicant thereto, contained in the Questionnaire which is made a part of the record in Exhibit 32 (Original Exhibits, pp. 13-32). It is recited in the Commission's report that "the case was submitted without formal hearing" (Record, p. 46). Of course the Commission may have made independent investigations of its own, as it had an undoubted right to do—and we are not here calling attention to these facts with any purpose of attacking the validity of the action they took, but as a matter of some interest in view of the petitioner's contentions. It does not appear that the trackage agreement heretofore referred to was ever before the Commission in the original or by copy. The information given to them about it seems to be rather meager. All that was said in the application was quite consistent with the applicant's view of it as an arrangement which it might abandon at will, or at most that it would make its own arrangements for abandonment (Original Exhibits, p. 12). In the applicant's answer to Question 1 of the Questionnaire, the existence of a contract between the applicant and the Boston & Albany Railroad Company, providing for joint facilities and trackage rights between Agawam and Spring-

field, dated August 25, 1899 (1889?) and to expire August 30, 1940, and providing for an annual payment of $15,000, is stated as then in force (Original Exhibits, pp. 15, 16). There is also a brief reference to this trackage agreement in the report of the Commission, in which it is recited that the agreement expires August 30, 1940 (Record, p. 46). There is no reference whatever to this agreement or to the abandonment of operation under it in the certificate and order of the Commission (Record, p. 47). Further interesting facts which appear in the answer of the applicant to Question 5 of the Questionnaire are that there were then first mortgage bonds of the Hartford & Connecticut Western Railroad Company aggregating $700,000, maturing July 1, 1923, resting in part on the line sought to be abandoned and the earnings thereof, the applicant being merely the lessee and not the owner of said line (Original Questionnaire, p. 17).

On September 8, 1921, the Interstate Commerce Commission issued its certificate (Record, p. 47). In one respect it purported to give the Central New England Railway Company something more than it had applied for. The application had sought merely for a certificate that would permit it to abandon *operation* of 1.87 miles of railroad, extending from Feeding Hills to Agawam Junction. The certificate purported to authorize the abandonment *of the line itself*. It is to be noted, however, that it nowhere appears in the record that the Central New England Railway Company has ever abandoned the line. The contrary fairly appears. On or about April 26, that company removed the rails for several hundred feet east of the east end of Agawam Bridge in order to prevent any possibility of cars getting away and fouling the main line of the New York Central, and to prevent any possibility of accident (Record, pp. 25, 27). The testimony of the general superintendent of the New York, New Haven & Hartford Railroad Company and superintendent of the Central New England Railway Company was that at the time of the trial the line from Feeding Hills to Agawam Junction was *abandoned for service or operation*. No doubt the cer-

tificate of the Interstate Commerce Commission was understood by the petitioner (and properly so) to relate to operation only, as sought in the application.

Having in mind the petitioner's assertion of the mandatory character of this certificate, it is interesting to note that it took no action under it until November 9, 1921, when its president and general manger sent to the vice-president of the respondent Boston & Albany Railroad, New York Central Railroad lessee, the notice, Exhibit 7 (Record, p. 8), that it would cease to make use of the license and permission acquired by it by virtue of contract of October 25, 1899, on December 15, 1921, thus selecting its own time for putting the permitted abandonment into effect. The notice stated that the Central New England Railway Company would discontinue payments under the contract after December 15, 1921. A long correspondence followed (Record, pp. 8–18), in which the respondent's representative sought to ascertain from the petitioner, not the authority under which it was to cease operation of its line from Feeding Hills to Agawam Junction, but upon what ground it asserted the right to cancel the trackage contract. The substance of this correspondence appears to have put the petitioner's claim of such right upon the ground that the contract was nothing but a license terminable at the will of either party (Record p. 15).

On April 5, 1922, an action at law was brought in the Superior Court for the County of Suffolk, by the New York Central Railroad Company against the Central New England Railway Company for breach of the aforesaid trackage agreement, upon the view that the former company as assignee of the agreement could recover in its own name. We have already referred to the fact that before judgment was entered in this action, the writ was amended by substituting the Boston & Albany Railroad as assignor for the New York Central Railroad Company as plaintiff, in accordance with the rescript of the Supreme Judicial Court. It is not correct to say that the action was specifically to recover damages of the total sum of $15,000 per year for the balance

of the term from December 15, 1921, to August 30, 1940. The declaration sought damages for the breach of contract whatever they might be found to be (Record, p. 37). The answer was (1) a general denial, which under Massachusetts practice put in issue every material allegation of the declaration; (2) that by reason of the wrongful acts of the plaintiff and the Boston & Albany Railroad Company, and for other reasons, the alleged contract had become impossible to perform; and (3) that the certificate of the Interstate Commerce Commission issued September 8, 1921, was a defense to the action (Record, p. 38). At the beginning of the trial of the action (February 8, 1927) the defendant made a motion to dismiss for want of jurisdiction, specifying as the grounds therefor (1) that the Transportation Act of February 28, 1920, gave the Interstate Commerce Commission exclusive jurisdiction of the subject matter involved in the case; (2) that that Commission had acted upon the subject matter involved in the suit by its order of September 8, 1921; (3) that the Commerce Act as amended had given to that Commission such jurisdiction of the subject matter of the case as to exclude the court from any jurisdiction thereof; and (4) that the Commerce Act as amended, and Sections 207 and 208 of the Judicial Code, had given to the Federal Courts exclusive jurisdiction of the subject matter of the case in such way as to exclude the state courts from any jurisdiction thereof. This motion to dismiss was then denied. It was renewed in the same form after the evidence in the case was all in (no doubt upon the ground that the evidence had disclosed what the pleadings did not) and was then again denied (Record, pp. 44, 45).

It is not correct to say that the defendant's evidence of the report and certificate of the Interstate Commerce Commission was excluded. It was admitted (Record, p. 27), as was also the more extended copy of the record of the Interstate Commerce Commission offered by the plaintiff as Exhibit 32 (Original Exhibits, pp. 11–36). It is true, however, that the trial court ruled and instructed the jury that it

was not a defense to the action (Record, p. 35), and was not to be considered upon the question of liability.

The ruling of the trial court on the effect of the Commissioner's Certificate by no means ended the trial. Failing in that defense, the defendant offered many other defenses. It contended that the trackage agreement had never been properly executed; that it was beyond the power of the Boston & Albany to make it; that it could not be assigned to the successors of that company; that that company and its successors had not performed their part of the contract; that it had never repudiated the contract, but had retained its rights under it; that consequently the damages, if any, must be limited to the single quarterly installment of $15,000 that had accrued prior to the bringing of the action; and that the plaintiff had sustained no damage, but had derived a real benefit from the cessation of operation under it. Much of the evidence was offered upon these questions during the trial, which lasted from February 8 to February 21, 1927 (Record, p. 45). Many of these matters have become immaterial in the present proceeding, for other obvious reasons as well as because of the terms of the stipulation under which much of the record was omitted at the request of the petitioner (Record, pp. 81–85). The petitioner waived any question concerning the measure of damages applied by the state courts; any question as to the legal execution and validity of the contract in suit, except as it may be claimed to have been affected by the order of the Interstate Commerce Commission, and any claim that the plaintiff and its assigns had failed to perform the contract so far as it and they were permitted by the defendant to perform it. The entire bill of exceptions of the plaintiff, which related only to the trial court's rulings on the measure of damages, was thus omitted (Record, p. 85). The charge of the judge in the trial court shows that there were submitted to the jury the questions (1) whether the contract was made, (2) whether the defendant repudiated it (Record, p. 33), and (3) the damages sustained (Record, p. 36).

The petitioner went to the Supreme Judicial Court upon its bill of exceptions. Such parts of that bill of exceptions as it deems material in this proceeding are set out in the record. Its exceptions were overruled by that court, except in one particular as to parties, which was permitted to be cured by amendment. The opinion of that court is set out in full in the record. The nine reasons assigned in the petition for certiorari all relate to alleged errors in that opinion (Record, pp. 5–7). The material questions submitted to that court by the petitioner's bill of exceptions, out of which all the errors are alleged to have grown, are simply these:

First, was the petitioner as defendant in the action at law entitled to have a verdict directed in its favor?

Second, had the state court jurisdiction of the action?

(See Court's summary of matters involved in defendant's exceptions (Record, p. 61); also petitioner's brief, pages 14 and 15.)

ARGUMENT.

I.

The federal questions, if any, presented by this petition for certiorari must stand upon the record of the case as submitted to the Supreme Judicial Court of Massachusetts, and cannot be enlarged by the petition to that court for re-argument.

The petitioner has seen fit to incorporate in its petition to this court an allegation that after the rescript of that court it applied to the Chief Justice for a re-argument that in that application it "set out clearly that private contracts were affected by force of the Act of Congress, and that the intention of the Commission as to any particular obligation was quite immaterial," and that this application was denied (Petition, pp. 4–5). It has also incorporated in the record a motion to stay judgment in the Superior Court while the application is being considered, and the allowance of that motion by a justice of said Superior Court.

It is well settled that such an application is no part of the state procedure, cannot be filed as a matter of right, and does not become a part of the record of the case.

Powers v. *Sturtevant*, 200 Mass. 519.

It also is well settled in this court that such an application comes too late to raise a federal question.

Pim v. *St. Louis*, 165 U. S. 273, 274.
Harding v. *Illinois*, 196 U. S. 78, 84.
Godchaux v. *Estopinal*, 251 U. S. 179.
Tidal Oil Company v. *Flanagan*, 263 U. S. 444, 455.

And a mere denial of such petition by the state court without opinion is not enough to give it any standing.

Looker v. *Schroeder*, 149 U. S. 580, 585.
Sayward v. *Denny*, 158 U. S. 180, 183.
Missouri Pacific R R. Co. v. *Hanna*, 266 U. S. 184.

It therefore does not appear in the record that the distinction attempted to be raised by the application, if of any importance, was seasonably presented to the Supreme Judicial Court.

II.

There are certain allegations in the petition for certiorari which obviously are not supported by the record.

1. It is alleged that the "petitioner constructed the branch line referred to from its lines in the south through Feeding Hills, Connecticut, to a point of connection on the Boston & Albany Railroad known as Agawam Junction" (Petition, pp. 1–2). As we have heretofore pointed out, the record shows that this line was built by the Hartford & Connecticut Western Railroad Company, of whose road the petitioner had a lease which was to expire August 30, 1940, and which had mortgaged the road to secure its bonds.

2. It is alleged that the petitioner operated the branch with a gradually decreasing number of trains from September 15, 1902, to December 15, 1921 (Petition, p. 2). In fact, the drop to a single round trip per day occurred in 1917, after the petitioner had begun to be operated as a part of the New Haven system.

3. It is alleged that the petitioner in May, 1921, applied to the Interstate Commerce Commission for a certificate of public convenience and necessity covering the abandonment of its operation over the branch line "and the Boston & Albany tracks from Feeding Hills into Springfield." As we have heretofore pointed out, the record shows that the certificate of public convenience and necessity applied for covered only the abandonment of *operation* of the 1.87 miles of track from Feeding Hills to Agawam Junction.

4. It is alleged that "termination of the contract, on which suit is brought, was necessarily incidental to your petitioner's carrying out the Commissioner's order." There is nothing in the record that supports this allegation.

5. It is alleged that the opinion of the Supreme Judicial Court was based on the theory that by the Transportation Act of 1920, Congress had authorized the Interstate Commerce Commission to sanction the abandonment of a contractual obligation such as existed in this case. We do not understand that the opinion went any further than to say that if the court assumed, without deciding, that such a construction be given to the act, it would not help the petitioner because it did not then appear that the Commission had intended to exercise such authority. As we shall show later, this assumption was made in favor of the petitioner, and in accordance with its own contention as set forth in its motions to dismiss (Record, p. 44).

III.

There was nothing in the decision of the Supreme Judicial Court which entitles the petitioner to maintain this petition for certiorari.

To avail the petitioner, the federal right relied on must, of course, be one that was asserted in the highest court of the state, and denied, to his injury.

1. The power of Congress to abrogate private contracts in the interest of interstate commerce is asserted by the state court in terms broad enough to suit the petitioner (Record, p. 66).

In its brief submitted with its petition for certiorari, at page 20, it says:

> "The claim of a federal right is based upon the paramount power of Congress to legislate concerning interstate commerce even to the extent of cutting across or abrogating private contracts. The Supreme Judicial Court of Massachusetts, on conclusive authority, admitted this power."

Again in the brief, at page 21, it says:

> "The case does not draw in question the constitutional validity of the federal statutes involved, so that it is not a case in which an appeal could be allowed."

This was a ruling very obviously sought by the petitioner and there would seem to be no occasion for us here to discuss it.

2. The state court further asserts that in the exercise of this power Congress may authorize the Interstate Commerce Commission to permit an interstate carrier "to abandon an existing obligation without thereby incurring a liability" (Record, p. 67). As an abstract proposition, this, too, would seem to be a ruling in favor of the petitioner's contentions. We are not aware that the petitioner objects to it as such. It would be rather difficult to see how, if the petitioner were not satisfied with this general proposition, it could allege in its petition that the "termination of the contract, on which suit is brought, was necessarily incidental to your petitioner's carrying out the Commission's order" (Petition, pp. 3–4), or how it could contend in its motion to dismiss that "the Transportation Act of February 28, 1920, . . . gave to the Interstate Commerce Commission the exclusive jurisdiction of the subject matter involved in this case" (Record, p. 44); or how it could fairly argue, as it does in its Brief, at page 24, that the respondent should have gone to the Commission for compensation for the damages it suffered from the abrogation of its contract.

As it seems clear that the petitioner could have suffered no injury from this ruling of the Supreme Judicial Court, there would seem to be no occasion for us here to discuss it.

3. The opinion of the Supreme Judicial Court makes clear the way in which the case was presented to it. On page 65 of the Record it says, "We shall consider the motion of the defendant to dismiss, in connection with its motion for a directed verdict." Again, at page 66, it says, "The matter of first importance, because it affects the jurisdiction of the court, is the contention that the certificate of public convenience and necessity issued to the defendant by the interstate commerce commission is a defence to this action." It seems clear that, as the petitioner then presented its case, the motions to dismiss and the motion for a directed verdict

rested on the same basic contentions of the petitioner. The motion to dismiss was as follows (Record, p. 44):

"*Motion to Dismiss (as Amended)—Filed Feb. 8, 1927.*

Now comes the defendant in the above entitled action and moves that this cause be dismissed on one or all of the following grounds, the defendant moving that this motion be in amendment of the motion to dismiss heretofore filed.

(1) Because the "Transportation Act of February 28, 1920," 41 Statutes at Large 474, which amended the Interstate Commerce Act of February 4, 1887, as amended, gave to the Interstate Commerce Commission the exclusive jurisdiction of the subject matter involved in this case.

(2) Because the Interstate Commerce Commission in pursuance of the Interstate Commerce Act of February 4, 1887, as amended by the Acts of June 29, 1906, April 13, 1908, June 13, 1910, February 17, 1917, March 2, 1917, May 29, 1917, August 10, 1917, and February 28, 1920, has acted on the subject matter involved in this suit and issued its order thereon, a copy of which is hereto annexed and marked Exhibit 'A' and made a part of this motion.

(3) Because the Interstate Commerce Act of February 4, 1887, as amended by the Acts of June 29, 1906, April 13, 1908, June 13, 1910, February 17, 1917, March 2, 1917, May 29, 1917, August 10, 1917, and February 28, 1920, has given to the Interstate Commerce Commission such jurisdiction of the subject matter of this case as to exclude this Court from any jurisdiction thereof.

(4) Because the Interstate Commerce Act of February 4, 1887, as amended by Acts of June 29, 1906, April 13, 1908, June 13, 1910, February 17, 1917, March 2, 1917, May 20, 1917, August 10, 1917, and February 28, 1920, and Sections 207 and 208 of the Judicial Code, being Act of March 3, 1911, 36 U. S. Statutes at Large 1148, and Act of October 22, 1913, 38 U. S. Statutes at Large 219, have given to the Federal Courts exclusive jurisdiction of the subject matter of this case in such a way as to exclude this Court from any jurisdiction thereof."

The Exhibit "A" referred to in paragraph (2) of this

motion comprised a certified copy of the report and certificate of the Commission, which appears on pages 45, 46 and 47 of the printed Record.

In view of the foregoing contentions of the petitioner, we submit that it cannot successfully be argued that the petitioner was denied any federal right when the court assumed, evidently for the purposes of the argument, that the Act of Congress had, as claimed by the petitioner, given to the Commission jurisdiction of "the subject matter involved in the case," whether that assumption was as a matter of law right or wrong.

Surely the subject matter of the suit was the trackage agreement that existed between the petitioner and the respondent, the right of the respondent to recover damages for the petitioner's breach of it, and the petitioner's contention that it had been abrogated by the action of the Commission.

Having assumed what, upon the record, it was justified in regarding as the contention of the petitioner concerning the power of the Commission, the Supreme Judicial Court rightly said that it remained to consider whether the Commission had exercised the power which it had been assumed Congress had conferred upon it [Record, p. 69].

Obviously the record disclosed no evidence that the Commission had attempted to abrogate the trackage agreement. The material parts of its certificate are as follows:

> "It is hereby certified, That the present and future public convenience and necessity permit the abandonment by the Central New England Railway Company of its line of railroad extending from the station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Massachusetts, as described in the application and report aforesaid:
>
> "It is ordered, That said Central New England Railway Company be, and it is hereby, authorized to abandon said line of railroad."

It may be true, as the petitioner says, that a cessation of

operation of its trains on this line would prevent it from operating trains on the Boston & Albany Railroad from Agawam Junction to Springfield; but that is a very different proposition from saying that it constituted a determination by the Commission that the trackage agreement with the Boston & Albany Railroad Company was to be abrogated without any liability whatever of the petitioner to the respondent for damages. It is obvious that the Commission carefully refrained from the use of any language that could be said to indicate any consideration or decision by them of the fate of the trackage agreement or as to the rights that remained to the parties under it. It did not in terms even authorize the abandonment of operation under it. Its certificate made no response to it whatever.

Nor could it properly be said that the abrogation of the trackage agreement by the Commission was implied in any of the language it used, either in its report or in its certificate. It mentioned an operating revenue of $2,686.04 and operating expenses of $41,518.62, resulting in an operating loss of $38,832.58, for the year 1920. Whether the $15,000 payment or any other payments to the Boston & Albany Railroad Company or its assigns were included in the $41,518.62 or not, or, in other words, whether what it called the operating loss was properly to be regarded as $38,832.58 or $23,832.58, was not shown to be a determinative factor in its right to issue the certificate. Even if it considered the $15,000 or some portion of it as a fixed charge from which the petitioner might not be relieved by the certificate, the operating loss from which the petitioner would undoubtedly be relieved was amply sufficient, so far as financial considerations were concerned, to warrant its issue of the certificate. It was therefore properly said by the court that the fact that it issued the certificate was no proof that it had decided one way or the other as to whether this $15,000 was or was not, either wholly or in part, an obligation from which the petitioner would be relieved by ceasing the operation of its trains. The record furnishes no

justification whatever for the petitioner's argument that the certificate of the Commission was of no value to the petitioner unless it relieved it from any liability on the trackage agreement.

Apart from this obvious lack of any evidence in the record from which it could be inferred that the Commission had assumed to abrogate the trackage agreement, other matters referred to in the opinion of the Supreme Judicial Court are very persuasive in leading the legal mind to the conclusion that it had no such intention. As the opinion states, there was no formal hearing, and the respondent was not made a party to the proceedings. The petitioner attempts to destroy any significance that might be given to this situation by calling attention to the fact that the notice specifically required by the Act of Congress under which the Commission acted was given by notice of the application to the Governor of Massachusetts and by publication in the *Springfield Republican* (Petitioner's Brief, p. 2). The published notice consisted of a copy of the application, and of course contained no intimation that the Commission were to consider whether the trackage agreement in question should be abrogated or the rights of the parties thereto adjusted in those proceedings (Original Exhibits, pp. 32-34). As previously stated, the application asked nothing more than a certificate of public convenience and necessity, permitting the abandonment of operation of the line between Feeding Hills and Agawam Junction. But this minimum of notice was not all that the Act of Congress contemplated. It provides further that "(19) the application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings."

The improbability that the Commission would attempt to pass upon the matters involved in this suit without notice to this respondent, and an inquiry as to how its interests would be affected by the abrogation of the trackage agreement, loses nothing of its significance by the petitioner's argument that

the constructive notice required by law was given. It took a long trial in the Superior Court to show how the interests of the respondent were affected by the petitioner's repudiation of the agreement; and all the material evidence there presented would be appropriate for the consideration of the Commission if it were assuming jurisdiction of the matters involved in that action, as the petitioner then contended it had done. It will not be assumed, of course, that the Interstate Commerce Commission, in its fostering care of the transportation systems of the country, would have any more concern for the welfare of the petitioner than for that of the respondent. We submit that, if the Commission supposed that it was passing upon the question whether the contract between the parties should be abrogated, it would have taken pains to hear from both of them.

If further corroboration were needed of the proposition that the Interstate Commerce Commission did not attempt to abrogate the contract, it is found in its view of its own power as expressed in a decision rendered by it in another case, October 24, 1927, after the trial of this action in the Superior Court. In that case the Chicago, Rock Island & Pacific Railway Company applied to the Commission for a certificate that public convenience and necessity permitted its abandonment of the *right* to use a line of the Denver & Rio Grande Western Railroad Company between Denver and Pueblo, under certain trackage agreements. The Commission dismissed the application for want of jurisdiction, holding that such a *right* was not a *railroad* within the meaning of the statute, and while it had power to permit the applicant to *cease operation*, it had no jurisdiction over the contractual right of one carrier to operate over the road of another. The Commission also expressed its doubts as to whether its certificates in abandonment cases, which were permissive only, could have any controlling effect over the agreements themselves, but said it was not their function to determine the legal effects of their orders.

Abandonment of Line by C., R. I. & P. Ry. Co., 131 I. C. C., 421.

Whether the Commission's view thus expressed as to its powers under the statute was right or wrong, it plainly shows that it did not assume jurisdiction over the subject matter involved in the action which the petitioner asks this court to review.

An earlier decision of the Commission shows that in issuing a certificate of public convenience and necessity under the Act of Congress, permitting a carrier to abandon the operation of a part of its line, it did not consider such certificate as a release of the carrier from its contractual obligations. The Maine Central Railroad applied to the Commission for permission (1) to purchase at a price not exceeding $60 a share all the outstanding stock of the Hereford Company, whose road it had leased for 999 years from May 1, 1890, at an annual rental of $64,500 a year, besides maintenance charges and taxes, and (2) having purchased the stock, to abandon the road. The road lay almost wholly in Canada, only .67 of a mile of its track being in New Hampshire. The Commission granted permission to purchase the stock, and certified that public convenience and necessity permitted the abandonment of that small part of the road which lay in New Hampshire, provided the Maine Central first established certain joint rates with other railroads, which it offered to do. Evidently the Commission thought that the lessee railroad was acting properly in assuming the entire loss which resulted from the abandonment, even though its certificate, which applied only to a small link of the line, might well have prevented the practical operation of any part of it.

Control of Hereford Railway, 99 I. C. C. 7.

It seems perfectly clear, therefore, that the Interstate Commerce Commission had not the slightest idea that by its certificate of September 8, 1921, it was deciding that the petitioner would no longer be liable to the respondent in any way upon the trackage agreement. It may be that if the petitioner, during the trial of the action in the Superior Court, had known that the views of the Commission were

those later expressed in the Rock Island case above cited, it would have framed its motions, requests and exceptions upon a different theory, as it unsuccessfully attempted to do in its petition for re-argument. But the duty of the Supreme Judicial Court was merely to consider them as they were framed, and the petitioner cannot here complain that it did so. It cannot maintain this petition upon theories not there relied upon or considered.

It may be that the reason why the petitioner, in its application to the Interstate Commerce Commission, did not even ask for a certificate permitting it to abandon operation from Agawam Junction to Springfield, but merely stated its intention to do so (presumably meaning that it would do so if the certificate covering operation from Feeding Hills to Agawam Junction were granted), was that it felt confident that the trackage agreement was nothing but a mere license revocable at will, or that if it was anything more than that, the damage would be insignificant, as contended in its correspondence and in the trial of the case. If such were its reasons, they make still more clear the lack of any intention of the Commission to assume any jurisdiction of the subject matter involved in that case.

In its brief the petitioner contends that the Supreme Judicial Court erred in considering the lack of any evidence of an intention on the part of the Commission to relieve the petitioner from further liability on its contract as a factor in its conclusion, because, as it says, the intention of the Commission was wholly immaterial. We have already endeavored to show that the petitioner can have no relief on this ground, because its own contention made it material. This contention not only appeared directly in its answer, its motions and its requests for rulings, which asserted that the order of the Commission was a defense to the action, because the Commission had passed upon the subject matter of the suit, but it appears to be a necessary corollary to the petitioner's construction of the Act of Congress which, it says, was intended to relieve a carrier from all liability on con-

tracts concerning a road which it was permitted to stop operating. If true, this would, of course, include contracts with other carriers, whose interests might be seriously affected. Whatever results the statute contemplates, it is only the action of the Commission that sets them in motion. It is the Commission that is to determine whether those results are such in its judgment as are consistent with public convenience and necessity, and in the interest of the transportation systems which are their especial care. Why should not the judgment of the Commissioners be material upon any matter that is assumed to be necessarily affected by the statute under which it acts?

IV.

There is nothing in the Act of Congress upon which the petitioner relies that gives to the certificate of the Interstate Commerce Commission the effect of relieving the petitioner from any further liability on the trackage agreement.

If in spite of the limited issues submitted to and decided by the state courts, it is regarded as open to the petitioner to contend that the certificate of the Commission had this unintended effect, it is necessary to consider the purpose of the Act and its terms.

1. And first as to the situation which it was intended to remedy. Sometimes railroads could abandon their entire lines because they had become so unprofitable that to compel them to run trains was confiscatory. Sometimes their charter provisions were permissive only and they could cease operation at will. Sometimes their charter or contractual relations were such that they could abandon their roads only with the permission of the state or states under which they were organized. And sometimes their charters were subject to forfeiture or they were compelled through receivership proceedings to sell their roads to satisfy the claims of their creditors. We know of no case where abandonment of its railroad was regarded as an easy method of getting rid of its debts.

When Congress, after the close of Federal control taken during the war, sought "affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country," it deemed it wise to put an end to this heterogeneous control, and to put the protection of the public interests in the hands of the Interstate Commerce Commission. In doing so it dealt not merely with the abandonment of roads, but also with their construction, giving to the Commission the power to decide in either case whether the proposed construction was required or the proposed abandonment permitted by public convenience and necessity. "The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission." "The sole test prescribed is that abandonment be consistent with public necessity and convenience."

Colorado v. *U. S.*, 271 U. S. 153, 166, 168.

2. The Transportation Act of February 28, 1920, amended Section 1 of the Interstate Commerce Act, by inserting parts (18), (19) and (20), which are as follows:

> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints of the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Attention is called to certain features of this Act.

(*a*) It is not mandatory in the sense in which the petitioner argues. No railroad is required to apply to the Commission for action under it. If it does so, its application is purely voluntary. So far as this Act is concerned, the petitioner might have continued to operate its trains from Feeding Hills to Springfield at least until August 30, 1940. The only mandatory feature about it is that the railroad cannot abandon without first obtaining the certificate of the Commission. This is prohibitory rather than mandatory.

(*b*) The certificate issued by the Commission under this Act is permissive only. This appears clear from the scope of part (18) which requires a like certificate for an extension of a railroad, or the construction of a new line of railroad, or the acquisition or operation of any line of railroad or extension thereof, or any engaging in transportation over or by means of such additional or extended line. If a railroad which had obtained a certificate authorizing it to construct or operate any of these roads, either because it found it impossible to raise the necessary capital, or because it met with unexpected or insurmountable physical difficulties, or for any other reason that made the project hazardous or undesirable, gave up the project and chose to take no action under the certificate, it would violate no provision of this Act, or of any other law that we know of. The same rule would hold true as to the abandonment provision; for the same purposes and language and the same terms of the Act apply alike to constructions and abandonments, except that in the latter case it is perhaps made more emphatic by the use of the word "permit." It also is true that a railroad that has obtained such a certificate is not required to act upon it immediately. The certificate does not outlaw. It remains in force whenever the railroad chooses to act upon it, unless it be sooner revoked. This is true not only because practical considerations require that construction, but also because of the language of part (20) which not only provides that the railroad may act "*from and after* issuance of the

certificate, and not before," but also provides that the penalties there imposed are to be inflicted only on those who act without the certificate, and not on those who fail to act with it. The petitioner attempts to avoid this reasoning by asserting that the Act gives the petitioner no alternative but to act on the certificate, because otherwise it would be guilty of "a violation of the mandate of Section 15*a* (2) and (3) of the Interstate Commerce Act for 'honest, efficient and economical management.'" The petitioner, however, loses sight of the fact that, if there were anything in this argument, it would apply equally to all the provisions of the Act in question, and would require applications to be made for certificates, quite as much as action under them when granted. Furthermore, we do not suppose that it will be contended by the petitioner that the record shows that it ever asked the state courts to construe the section of the Interstate Commerce Act last cited. It follows, we submit, that the petitioner was right in assuming that it was under no obligation to act upon the certificate until more than three months after it was issued, since it was not required to act upon it at all unless it chose to do so, and its action when taken, like its application for the certificate, was purely voluntary. The petitioner, claiming that there is no difference in the effect of a permissive and of a mandatory order, has cited some cases that deny the right of third parties to interfere with the right of the railroad to act under it. But we are not arguing in favor of any right of third parties to interfere with the action of the party to whom the certificate is issued. It is as to the applicant itself that the certificate is merely permissive.

(*c*) The permissive character of the certificate shows the fallacy of the argument that the certificate of itself constituted a defense to the action, and of the revised argument that the statute itself gave that effect to the certificate regardless of the intent of the Commission. If the petitioner had not applied for the certificate and then decided to act under it, there would have been no breach of the trackage

agreement. The petitioner argues that if our view of the statute is correct, a railroad desiring to anbandon its line would be obliged to choose between abandonment and continued operation. It is equally true, of course, that a railroad that applied for permission to construct a new line would have to choose between its probable capital expenditure and the probable income from it, and ordinarily it would try to make such choice before it applied to the Commission for a certificate. In either case its choice might turn out to be unfortunate.

(*d*) There is nothing in the purpose of the statute, nor in its language, that indicates an intention to exempt carriers from all liability on their contracts or provides any machinery for dealing with such matters. There is not a word in the statute which indicates that it had any other purpose than the obvious one of forbidding interstate railroads to do certain things without the certificate of the Commission that the proposed action was consistent with public convenience and necessity. It does not even require that they do them.

3. There is no merit in the petitioner's contention that an implied right to repudiate its contracts with impunity is given by the statute in question. The right of a party to a lawful contract to repudiate it and take its chances of being compelled to pay substantial damages is, of course, not questioned. A right to specific performance rests in the court's discretion, and is not necessarily an incidental contract remedy. It is not contended that the respondent could have compelled the petitioner to operate its trains between Agawam Junction and Springfield, either before or after the passage of the Transportation Act. All the respondent had was a right to recover its damages for breach of the contract by the petitioner, and this right, we say, the statute did not take away. So far as we are aware, this court has never said that such a result would follow from a statute of this kind. The petitioner, we believe, says that it presents a question never decided by this court.

A consideration of the practical consequences of the peti-

tioner's contention will expose its fallacy. If it is true, its application is not to be limited to a trackage agreement like the one in question. It must equally apply to every contract the specific performance of which is inconsistent with action of the railroad permitted by a certificate of the Commission. It is matter of common knowledge that many of the railroads of the country are operating large parts of their systems under leases, in many of which the rentals are very high; that many of them have contracts for the use of the tracks of other roads; that many of them have contracts with terminal companies; that many of them have contracts for supplies and for services running into the future, sometimes for extended periods; that many of them have large amounts of outstanding bonds secured by mortgages on all or parts of their systems, or bonds secured by mortgages on their leased lines whose payment they have guaranteed. It would be useless to attempt to enumerate all their contractual relations. Many others will doubtless suggest themselves to the Court. Applications for the certificates provided for in the statute under consideration may be for abandonment of the railroad's entire line, as well as for a part of it. Is it conceivable that this statute was intended to relieve the applicant of every contract the specific performance of which was rendered impossible by the action of the applicant under the certificate of the Commission? The petitioner may be right in calling this a question of importance, if there is any likelihood that this court would adopt any such construction of this statute; but to us that possibility seems too remote to require the serious consideration of the court.

An examination of the records of the Commission will show that when there has been an application for abandonment of a leased line, it has been quite customary for lessor and lessee to join in the application, probably because the terms have been arranged between them, as in the Hereford Railway case above cited.

Of course, when the petitioner got its lessor, the Hartford, Connecticut & Western Railroad Company, to build this new line from Tariffville to Agawam Junction, it must have

entered into new contractual relations with it concerning the rental and other matters. We wonder if the petitioner thinks the certificate of abandonment abrogated or modified those contractual relations, or whether it has agreed with its lessor that it will continue them in spite of the statute. For example, if there is anything in the petitioner's arguments, of course the petitioner ought not to be paying the interest on so much of the mortgage debt as was contracted in building the abandoned line, since that would not be an honest and efficient way of carrying on its business.

4. There is no useful analogy between this case and the rate cases upon which the petitioner places so much reliance.

(*a*) Rates are clearly mandatory, and do not depend upon their acceptance by the railroads.

(*b*) Some of their features are expressly fixed by statute, and contracts in conflict therewith are made unlawful.

(*c*) This Court has never shown any disposition to deprive parties, even in those cases, of any remedy when justice seemed to require one.

Louisville & Nashville R. Co. v. *Mottley*, 219 U. S. 467, often cited as sustaining the petitioner's contention, merely denies the right of specific performance and declines to consider whether the plaintiff had some other remedy.

In *New York Central & Hudson River Railroad Co.* v. *Gray*, 239 U. S. 583, where Gray had received a contract for transportation in part payment for his services as an architect, which contract the railroad was prohibited from performing by the Hepburn Act, it was not only held that he was entitled to recover, but that his action was properly brought in the state court (the City Court of New York), this Court saying that in permitting recovery the state court "was simply administering the applicable principles of state law, and did not run counter to the Act of Congress."

In *Ortega Co.* v. *Triay*, 260 U. S. 103, a suit to enjoin a receiver from collecting rates on an electric railroad in excess of those fixed by contract, it was held that the injunction was properly denied, but the Court further said: "Necessarily, therefore, we affirm the action of the District Court, but

while this denies the relief the Ortega Company prays against the appellee, we do not wish to be understood as adjudging that the company may not be entitled to some remedy for the non-observance of the contract of the Tacoma Company. See *Louisville & N. R. Co.* v. *Crouch*, 156 Ky. 27; 160 S. W. 750."

For other cases in which it was intimated that a refusal of specific performance was not to be regarded as a denial of any other remedy, we refer to the following:

Armour & Co. v. *Dallas*, 255 U. S. 280, 286.

Beasley v. *Texas & Pacific Ry. Co.*, 191 U. S. 492, 496, 497.

Texas & Pacific Ry. Co. v. *Marshall* 136 U. S. 393, 405.

Louisville & N. R. Co. v. *Johnson, Admx.*, 207 Ky. 813.

Louisville & N. R. Co. v. *Letcher County C. & I. Co.*, 243 S. W. 45.

St. Paul & Tacoma Lumber Co. v. *Northern Pacific Ry. Co.*, 4 Fed. 2d, 359.

It will be noted that we are not here concerned with any question as to the measure of damages. As to that matter, the petitioner makes no complaint. It was the respondent that complained of that in the state court. The petitioner did not. Furthermore, it has been expressly stipulated that, since that question is not to be raised, evidence as to damages is omitted from the record (Record, p. 81). Petitioner's motion for a directed verdict, and its contentions as to the effect of the certificate of the Commission, were based on the theory that it was a *complete defense*, and not a *partial defense*. Nevertheless, it is our duty to point out that the record does not warrant the assumption that the respondent rendered no consideration for the annual payment of $15,000 except the use of its facilities as they stood at the time that the petitioner began operation under the trackage agreement. The record affords no evidence that such was the fact, and the petitioner does not appear to have offered any.

It does appear that Mr. Biscoe testified, on cross-examination by the petitioner, that some changes were made in the tracks in the Liberty Street yard while the petitioner was operating under the agreement, and that some changes in the Springfield yard were made, work on which began in 1918 (Record, p. 19). It is a fair inference that in all such capital expenditures the respondent had in mind providing for all the needs of the road, including provision for the trains which the petitioner had the right to run. There was no provision in the agreement that the petitioner should contribute to the cost of these capital expenditures otherwise than by the $15,000 payments. Both Truden and Curry testified that the facilities of the respondent were ample to take care of its own trains and six round trips per day of the petitioner in 1921 (Record, pp. 22 and 24).

If we are right in our contention that both the application of the petitioner for a certificate under the statute and the petitioner's action under it are to be regarded as voluntary acts on its part, it seems clear that it cannot thereby be relieved from liability for its breach of the trackage agreement; and this is true, even though its conduct results in what may be termed legislative action.

Re Companies' Acts, 117 Law Times, 60.
Stanton v. *New York & Eastern R.R. Co.*, 59 Conn. 272.
Proctor v. *Union Coal Co.*, 243 Mass. 428.
John Soley & Sons Inc. v. *Jones*, 208 Mass. 561.
United States v. *Gleason*, 175 U. S. 588, 602.
Day v. *United States*, 245 U. S. 159.
Jones v. *United States*, 96 U. S. 24, 29.

In this case it also appears that it was the petitioner's voluntary action in diverting its traffic to the New Haven road that occasioned its application.

V.

There is no question that the trackage agreement was not a revocable license.

If there ever was any substantial question on this point, it is not here open to the petitioner (1) because this was a Massachusetts contract, made and to be performed in that state, and its construction involves no Federal question; (2) because the petition presents no such question; and (3) because the validity of the contract and its performance by the respondent and its assigns are conceded in the stipulation of the parties (Record, p. 81).

If, nevertheless, this court reserves the right to construe the contract itself, because of the nature of the questions raised, as in *Railroad Commissioners of Texas* v. *Eastern Texas Railroad*, 264 U. S. 79, we submit that it can reach no other conclusion than that adopted by the state courts—that it was an agreement binding on both parties up to August 30, 1940.

It would seem to be absurd to argue that under the circumstances which the petitioner says accompanied the making of this agreement, the respondent could have terminated it at will.

The following authorities appear to establish the view of it taken by the state courts:

Union Pacific Ry. Co. v. *Chicago, etc., Ry. Co.*, 163 U. S. 564.

Joy v. *St. Louis*, 138 U. S. 1.

Franklin Tel. Co. v. *Harrison*, 145 U. S. 459.

M'Kell v. *Chesapeake & Ohio Ry. Co.*, 175 Fed. 321.

Texas & P. R. Co. v. *Louisiana Public Service Commission*, 12 F. (2d) 798.

Western Union Tel. Co. v. *G. R. & Banking Co.*, 227 Fed. 276.

King v. *David Allen & Sons Bill Posting, Ltd.*, 2 Appealed Cases 1916, 54.

Great Northern Railway Co. v. *Manchester, Sheffield, etc., Ry. Co.*, 5 De Gex & Sm., 138.

Llanerch & Dock Co. v. *London & N. W. Ry. Co.*, L. R. 8 Ch. App. 942.

R. H. White Co. v. *Remick & Co.*, 198 Mass. 41.
United Merchants R. & I. Co. v. *American B. Co.*,
128 N. Y. Supp. 666.
Collister v. *Hayman*, 183 N. Y. 250.
10 A. L. R. 1110.

To say that because this agreement uses the word "license" it must be revocable at will, is a mere play upon words. It is necessary to consider all the terms of the agreement and the circumstances under which it was made.

VI.

The state court had jurisdiction of the case.

The petitioner in its motion to dismiss states four grounds for the motion. The first three of these, as we have shown, are based upon its contention that the Transportation Act gave the Interstate Commerce Commission exclusive jurisdiction of the subject matter involved in the action, and that it had exercised that jurisdiction. We have shown that the Commission never attempted to pass upon the question whether the respondent had a right of action against the petitioner for breach of the trackage agreement, and that no such action on its part is to be inferred from its certificate that public convenience and necessity permitted the petitioner to abandon the operation of its line from Feeding Hills to Agawam Junction. In granting this certificate it was considering public interests only and not private rights.

There remains the fourth ground stated in the motion—that the Federal Courts have exclusive jurisdiction of the case. In support of this contention the petitioner relies upon Sections 207 and 208 of the Judicial Code, which gave to the Commerce Court jurisdiction of "suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission," and Act of October 22, 1913, which abolished the Commerce Court, and transferred its jurisdiction to the District Court of the United States.

The answer to the petitioner's contention is that the action

in question is not a suit to enjoin, set aside, annul or suspend an order of the Interstate Commerce Commission. The respondent does not attack the certificate issued September 8, 1921, nor question the power of the Commission to issue it. It would be as useless for the respondent to ask the District Court to set aside the Commission's certificate as it would have been to ask the Commission to decide whether it had a right of action on the trackage agreement, and what damage, if any, it was entitled to recover. The petitioner now says that the lack of any intention on the part of the Commission to deal with the matters involved in the action is wholly immaterial and that it is the Transportation Act which constitutes its defense. We say (1) that this distinction is not open to the petitioner because it was not presented seasonably to the state court, and (2) that, if it is open, it is clear that that Act was not intended to deal with any such question. In this state of things, there is nothing in the statutes relied on by the petitioner which deprives the state court of jurisdiction to entertain an action of this kind, even if its decision is subject to review, in the discretion of this Court.

New York Central & Hudson River R.R. Co. v. *Gray*, 239 U. S. 583.

See also *Great Northern Railway* v. *Merchants Elevator Co.*, 259 U. S., 285, and cases collected in note, page 295, and references therein to *Cheney* v. *Boston & Maine Railroad*, 227 Mass. 336, as *contra*, cited in the opinion of the Supreme Judicial Court (Record, p. 70).

Also the following state court decisions:

Louisville & N. R. Co. v. *Crowe*, 156 Ky. 27.

Louisville & N. R. Co. v. *Johnson, Admx.*, 207 Ky. 813.

Louisville & N. R. Co. v. *Letcher County C. & I. Co.*, 243 S. W. 45.

VI.

SUMMARY

The respondent asks that the petition for certiorari be denied.

1. Because there has been no decision in the state court of any Federal question properly raised by the petitioner, of which it can rightly complain in this proceeding. Its failure there was due to lack of evidence to sustain the proposition it then advanced.

2. Even if there is a Federal question, upon the record it has so little merit that the Court, in the exercise of that discretion which it has in certiorari proceedings, might well decline further to entertain it.

Respectfully submitted,

LOWELL A. MAYBERRY,

Attorney for Respondent.

GEORGE H. FERNALD, JR.,
MAYBERRY, HALLOWELL & MAYBERRY,

Of Counsel.

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A.

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(a) Consideration of federal Statutes relative to the Interstate Commerce Act as amended by the Transportation Act of February 28, 1920. (p. 12.)
(b) Section 22 has not been abrogated or modified but preserves all existing rights not inconsistent with those created by the Statute. (p. 15.)
(c) The action in this case lay in the State Court because it was brought to enforce common law rights. (p. 16.)
(d) The respondent made no attack open or covert upon any regulation or order of the Commission relative to its certificate of abandonment. (p. 19.)
(e) The State Court had jurisdiction to construe the order of the Interstate Commerce Commission. (p. 19.)

B. PAGE

The Amended Interstate Commerce Act and Certificate and Order of the Commission issued thereunder do not protect the petitioner in this action 20-37

I. (a) Provisions of Transportation Act relative to abandonment show no Congressional purpose to relieve railroads from their obligations to their creditors or to take from the latter any remedial process provided by the laws of the state. (p. 20.)

(b) Congress did not empower Interstate Commerce Commission to take away a creditor's rights when it exercises its administrative judgment relative to abandonment. (p. 22.)

(c) Commission has no power under Section 20 to determine in its administrative discretion that public convenience and necessity require the abrogation of contracts. (p. 24.)

(d) If Congress had intended to empower the Commission to destroy contract rights it would have used clear language to that effect. (p. 24.)

(e) If assumption of State Court that Congress authorized the Commission to sanction the abandonment by an interstate carrier of contractual obligations is correct then the conclusion of State Court that Commission did not exercise such authority in the instant case, is sound. (p. 25.)

II. Provisions of Transportation Act relative to abandonment show no Congressional purpose that the Commission's order should by force of the federal statutes relieve the railroad from its obligations to creditors. (pp. 25-36.)

(a) Vice of petitioner's reasoning lies in the fact that it is imputing to Congress an intention which is not reasonably implied. (p. 28.)

(b) When abandonment takes place pursuant to the Commission's order the burden upon interstate commerce which Congress had in mind has been removed. Congress did not concern itself with

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the legal rights of parties who might be affected by the abandonment. (p. 28.)

(*c*) Obligations arising out of mortgages, leases, trackage contracts, and claims for personal services all must be treated alike in the case of abandonment under the Act. (p. 29.)

(*d*) It appears from petitioner's admissions that its contention includes such burdensome obligations as mortgages. (p. 30.)

(*e*) It would be futile to pretend that Congress under the Interstate Commerce Act intended a rich and powerful carrier who chose to abandon a part of its road to be relieved of its obligations. (p. 34.)

(*f*) In consequence of so many problematical matters it is indisputable that Congress had no intention of permitting an abandoning road to escape its contractual obligations. (p. 34.)

III. There is no useful analogy between this case and the rate cases and others upon which the petitioner places so much reliance. (pp. 36–37.)

C.

The agreement of October 25, 1899, between the petitioner and the respondent is a trackage contract for a stated period, which is not terminable at will, and under its terms the annual payments, which were in consideration of the right to use the trackage facilities of the respondent, were to be made irrespective of the petitioner's use thereof, and such payments were not excused by the petitioner's voluntary conduct in obtaining permission to abandon a part of its line the operation of which was necessary to the continued use of the trackage facilities of the respondent (Respondent's original brief, pp. 31–33) 38–49

(*a*) The agreement is a trackage agreement not terminable at the will of either party. (p. 38.)

(*b*) The State Court properly ruled that the agreement "indicates that the annual payment was to be made irrespective of use. It was consideration

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paid for the right to use and not for the use, . . ." (p. 44.)

(c) When the contract was executed October 25, 1899, by its terms the Boston and Albany Railroad Company gave to petitioner the right to use its tracks until August 30, 1940. (p. 44.)

(d) The consideration was for the right to use and not for the use. If the petitioner did not see fit to avail itself of its right or voluntarily placed itself in a position where such right would be unavailable, nevertheless its obligation to make the payments is unaffected thereby. (p. 44.)

(e) Vested rights took place when the bargain was made. The subsequent conduct of petitioner in applying for permission to abandon, cannot prevent a recovery of what was stipulated upon October 25, 1899. (p. 44.)

(f) The Court is not concerned in this case with a situation where performance of a contract has been rendered impossible by an act of Congress passed after the contract was made. (p. 45.)

(g) Impossibility arising from the promisor's own act is not in any case an excuse for non-performance of his contract. (p. 46.)

(h) When this contract was made, possibility of abandonment was foreseeable and parties could have made provisions for a dispensation respecting payments. (p. 47.)

(i) Inasmuch as petitioner by its own voluntary conduct was responsible for changed conditions the English doctrine that frustration of the commercial adventure brings the contract to an end, is wholly inapplicable. (p. 48.)

(j) In the instant case impossibility of performance is not the result of any prohibitory regulation upon the part of the Interstate Commerce Commission but is solely due, if at all, to the voluntary act of the petitioner in applying to that body for permission to discontinue a part of its road. (p. 49.)

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 532.

CENTRAL NEW ENGLAND RAILWAY COMPANY,
Petitioner,

v.

BOSTON & ALBANY RAILROAD COMPANY, ASSIGNOR FOR THE BENEFIT OF NEW YORK CENTRAL RAILROAD COMPANY, *Assignee, Respondent.*

SUPPLEMENTAL BRIEF FOR THE RESPONDENT.*

I.

HISTORY OF THE CASE.

The respondent commenced an action in the Superior Court for Suffolk County, Commonwealth of Massachusetts, against petitioner to recover damages because of the breach of a written contract executed on or about October 25, 1899.

In substance the first section of the contract provided that whereas the defendant petitioner herein in pursuance of a previous agreement between the parties and others dated May 9, 1898 was then constructing and would shortly complete the branch railroad from Tariffville, Connecticut, to a point at or near West Springfield, Massachusetts, to connect with

*This supplemental brief is in amplification of the brief filed by the respondent in opposition to the petition for certiorari and reference will be made to the same in discussing the questions of law presented to the court. The court is respectfully requested to consider the former brief in connection with this.

the lines of the plaintiff, from and after the opening of the branch line for the passage of regular trains until the 30th day of August, 1940, the Boston & Albany Railroad was to license and permit, subject to certain conditions therein set forth, the defendant and its successors to pass with its trains and locomotives over its lines between the point of connection west of the Connecticut River and the yard and engine houses of the Boston & Albany Railroad Company at West Springfield in each direction, and to license and permit passenger trains to cross the bridge over the Connecticut River into the Union Station at Springfield, with the right to use in connection with such trains all water stations and other facilities necessary for the accommodation of such trains and the traffic to be transported by them, the defendant paying to the plaintiff therefor fifteen thousand dollars ($15,000) per annum in equal quarterly payments on the first days of January, April, July and October of each year, the first payment to be made upon the first quarterly period next succeeding the opening of said branch line for the passage of regular trains.

The contract further provided in substance that, if the daily average number of trains should exceed three freight trains of not more than thirty cars in each train in each direction and three passenger trains in each direction, the price to be paid should be increased in the proportion in which the increased number of trains exceeded the number of trains provided for and that that amount was to be computed once in six months during the term of the contract and payment to be made accordingly.

The first paragraph of the body of the contract also provided that if the defendant should take water from any water stations of the Albany company it should share in the expense of maintaining such stations; that the defendant should pay $1 per day for stalls used in the plaintiff's engine house and that the defendant should be permitted to erect a coal platform or trestle at some convenient point.

The second paragraph of the body of the contract provided that the Albany company should transfer freight cars brought

by the defendant to the West Springfield yard to a connection with the Boston & Maine or the New York, New Haven & Hartford railroad companies' lines in Springfield for the rate of $2 a car; that the Albany company should move such freight so brought by the defendant designed for points in Springfield for the rate of 30 cents a ton except coal on which the rate was to be 50 cents a ton and that for such freight as was required to pass through the freight house of the Albany company the rate to be charged should be 50 cents per ton and in addition a proportional charge for labor.

The third paragraph of the body of the contract provided that the Albany company for passenger business shall sell tickets, handle baggage and take care of passenger trains in its passenger yard and transfer through passenger cars to connecting lines.

The fourth paragraph of the body of the contract provided that the defendant should build and maintain an interlocking tower at the junction of its road with that of the plaintiff.

The fifth paragraph of the contract dealt with the ascertainment and apportionment of responsibility between the parties in case of accident or loss.

The sixth paragraph of the contract provided that the defendant and its successors should make the payments by this contract in accordance with the terms thereof.

The seventh and last paragraph of the body of the contract provided that the defendant should make no transfer of the contract rights without the consent of the Albany company and that in case of breach by the defendant or its successors continuing for thirty days or in case the contract rights should be taken from the defendant or its successors by process of law by bankruptcy, insolvency, receivership or otherwise the Albany company or its successors might at any time terminate this contract and all rights acquired thereunder by the defendant.

The defendant's substitute answer denies each and every allegation in the plaintiff's "writ and declaration contained. And for further answer to the plaintiff's declaration the de-

fendant says that the alleged contract attached to the plaintiff's declaration as Exhibit 'A' was signed in pursuance of a previous agreement dated May 9, 1898, between the Boston & Albany Railroad Company, the Hartford & Connecticut Western Railroad Company, and the Philadelphia, Reading and New England Railroad Company and its Reorganization Committee, by the terms of which the defendant, Central New England Railway Company, was to be organized to enter into said Exhibit 'A'; that, after the making of the contract alleged in the plaintiff's declaration both by the action of the plaintiff and the Boston & Albany Railroad Company, jointly and severally, and also because of other circumstances not within the possible contemplation of the parties thereto at the time of the making of said agreement, the operation of trains into Springfield over the tracks of the defendant and the Boston & Albany Railroad Company and the performance of said arrangement by the defendant was rendered illegal, impossible, and such a hardship and heavy burden on the defendant as to be unenforceable, confiscatory, and contrary to the Constitution of the Commonwealth of Massachusetts. And for further answer to the plaintiff's declaration the defendant says that on September 8, 1921, in accordance with paragraphs 18 and 19 of Section 1 of the Interstate Commerce Act (41 U. S. Statutes at Large 474) a certificate of public convenience and necessity was issued to the defendant by the Interstate Commerce Commission, a copy of which is marked Exhibit 'B' and made a part of this answer; that in pursuance of and in reliance on this certificate the defendant abandoned its line of railroad extending from Feeding Hills in the Town of Agawam, County of Hampden, Massachusetts, to its connection with the Boston & Albany Railroad, and ceased the operation of trains over this line into the City of Springfield, Massachusetts, by way of the plaintiff's tracks as provided in Exhibit 'A'* of the plaintiff's declaration."

After a trial and verdict for the plaintiff (respondent

*Vide: Record pp. 34, 35, 36 "Original Exhibits."

herein) in the Superior Court, the case came before the Supreme Judicial Court for the Commonwealth on two substitute bills of exceptions, one of the plaintiff, and the other of the defendant (petitioner herein). The bill of exceptions for the plaintiff was addressed mainly to rulings of the presiding judge on the measure of damages and as to the burden of proof upon the issue of the amount of damages. The exceptions of the defendant related (1) to the refusal of the presiding judge to grant its motions to dismiss the action in substance because as it is alleged the federal statutes have given to the federal courts exclusive jurisdiction of the subject of this case; (2) to the refusal of the presiding judge to grant its motion for a directed verdict; (3) to the admissibility or rejection of testimony, and (4) to the granting of certain requested rulings of the plaintiff and to the refusal to give certain requests for rulings made by the defendant.

The state court overruled defendant's exceptions and those of the plaintiff. The opinion will be found at page 59 of the record. The defendant subsequently filed a petition for writ of certiorari wherein it alleged that the judgment of the state court is erroneous and should be reviewed by this court for the following reasons:

1. Because the judgment and opinion of the Supreme Judicial Court dismissing your petitioner's exceptions fail to recognize the validity as a defense to the action of the certificate and order of the Interstate Commerce Commission, issued, in the proceeding numbered 1749 on its finance docket, under paragraphs 18 to 22 of section 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920 (41 U. S. Stats. at Large 474).

2. Because the judgment as affirmed by the decision dismissing your petitioner's exceptions denies entirely to your petitioner the right, claimed by it under the amended Interstate Commerce Act (41 U. S. Stats. at Large 474) as applied, to cease operation and further payments under the contract sued on with impunity.

3. Because the judgment as affirmed by the decision dismis-

sing your petitioner's exceptions denies to your petitioner the validity of the amended Interstate Commerce Act (41 U. S. Stats. 474) as a defense to an action for damages arising from action covered by a certificate and order issued by the Interstate Commerce Commission.

4. Because the judgment as shown by the opinion of the Supreme Judicial Court dismissing your petitioner's exceptions proceeds on the theory that the certificate and order of the Interstate Commerce Commission is invalid as a defense to the action because the Commission did not affirmatively intend to abrogate the obligation on which suit was brought, whereas the effect on private contracts of orders issued by the Commission under paragraphs 18 to 22 of section 1 of the amended Act is a question depending, not upon the Commission's intention as to the particular contract, but upon the legal interpretation of the Act of Congress.

5. Because the judgment as shown by the opinion of the Supreme Judicial Court dismissing your petitioner's exceptions proceeds on the theory that the certificate and order of the Interstate Commerce Commission is invalid as a defense to the action, on the ground that the Commission did not affirmatively intend to abrogate the obligation sued on, whereas the Commission has properly pointed out (131 I. C. C. 421) that it has no power under paragraphs 18 to 22 of section 1 of the amended Interstate Commerce Act to authorize, as such, the abrogation of contract obligations.

6. Because the judgment, as shown by the opinion of the Supreme Judicial Court dismissing your petitioner's exceptions, relies upon the alleged fact that the Interstate Commerce Commission did not intend to adjudicate that the annual $15,000 payment was an operating charge of your petitioner, whereas the accounting nature of said annual payments is immaterial on the question as to the legal effect of the action of Congress and the Interstate Commerce Commission and said annual payments were properly operating charges of your petitioner and have been so adjudicated by the Interstate Commerce Commission.

7. Because the judgment as affirmed by the opinion of the Supreme Judicial Court dismissing your petitioner's exceptions renders ineffective Congressional legislation and action thereunder, which was passed for the purpose of relieving burdens on the interstate operations of interstate common carriers.

8. Because the denials of your petitioner's motions to dismiss on jurisdictional grounds deny to your petitioner the rights given by sections 207 and 208 of the amended Judicial Code (U. S. Code Ann. title 28, secs. 41 (28), 46; 36 U. S. Stats. at Large 1148, and 38 U. S. Stats. at Large 219), although the inevitable effect of said denials and judgment is to limit the application of an order of the Interstate Commerce Commission, suspend the operation of the order as against the agreement sued on, and annul its effect to a certain extent.

9. Because the questions presented are federal questions of public importance and of general interest to the interstate railroads of the country, not heretofore determined by this court, which have been decided by the state courts of Massachusetts in a way not in accord with the law and applicable decisions of this court.

The petition for certiorari was granted January 22nd, 1929.*

II.

Brief Statement of Facts.

In June, 1921, the defendant, under sec. 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920, 41 U. S. Stats. at Large 474, filed its application "for a certificate of public convenience and necessity . . . permitting the abandonment of operation of its line between Feeding Hills, Massachusetts, and Agawam Junction, Massachusetts"

*The purpose of this certiorari is to review the judgment of the Superior Court, but the only questions of law which will be discussed in this brief are those properly falling within this court's jurisdiction.

(Original Exhibits, p. 12). The point where said line connected with the Boston & Albany Railroad was at a distance of approximately 1.87 miles from Feeding Hills.

1. On this application the report of the commission is in part as follows: The Central New England Railway Company "owns and operates about 300 miles of track in its entire system. Its trains enter Springfield, a city of more than 100,000 inhabitants, by using 4.05 miles of track of the Boston & Albany railroad. Under the trackage agreement the applicant is to pay the Boston & Albany railroad company $15,000 a year for *the right to operate* over this track not more than 3 freight trains of 30 cars each and 3 passenger trains daily. This agreement expires August 30, 1940. The applicant proposes to abandon about 1.87 miles of track extending from Agawam to its connection with the Boston & Albany. The traffic is very light over this line; it is handled in one mixed train a day for the present time and is not likely to increase in the near future. From Agawam an electric line runs directly into Springfield, hauling passengers and light freight. For the year 1920 the revenue derived from the line proposed to be abandoned was $2,686.04, and the operating expenses were $41,518.62, resulting in an operating loss of $38,832.58. Upon the facts presented we find that the present and future public convenience and necessity permit the abandonment of the line in question. A certificate to that effect will accordingly be issued."

2. On September 8, 1921, the commission issued a certificate of public convenience and necessity in the following form:

"Investigation of the matters and things involved in this proceeding have been had, and said Division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof: It is hereby certified, That the present and future public convenience and necessity permit the abandonment by the Central New England Railway Company of its line of railroad extending from the

station of Feeding Hills in the town of Agawam to a point where said line connects with the Boston & Albany Railroad, both in Massachusetts, as described in the application and report aforesaid; It is ordered, That said Central New England Railway Company, be and it is hereby, authorized to abandon said line of railroad; It is further ordered, That said Central New England Railway Company, when filing schedules canceling tariffs applicable to said line of railroad, shall in such schedules make specific reference to this certificate by title, date and dockets number."*

3. On November 9, 1921, the defendant sent the Boston & Albany Railroad Company a letter, which reads:

"Please take notice that this Company will discontinue operation of its lines north of Feeding Hills station, and between there and Agawam Junction, effective December 15, 1921. At said date this Company will cease to make use of the license and permission acquired by it by virtue of contract with your Company of October 25, 1899, and will discontinue payments thereunder as of said date. The above discontinuance of operation is by virtue of certificates of the Interstate Commerce Commission, Division 4, dated September 8, 1921, in the matter of application of the Central New England Railway Company for a certificate of public convenience and necessity, Finance Docket No. 1479. If any questions of detail arise in connection with the discontinuance, they may be taken up and settled by mutual agreement between representatives of the two Companies."**

4. The contract referred to in defendant's letter under date of November 9th, 1921 and its legal effect is stated as follows by the state court (record page 70):

> "Under the terms of the contract the defendant agreed to pay $15,000 per annum in return for the plaintiff's promise to 'license and permit . . . (it) to pass with trains . . . over the line of the (plaintiff's lessor).'

*Record, pp. 63, 64.

**Record, p. 64.

The agreement is free from ambiguity and indicates beyond a doubt that the annual payment was to be made irrespective of use. It was consideration paid for the right to use and not for the use, and as so construed it does not involve a forfeiture. If it be assumed that the agreement is in the nature of a license rather than an easement in gross, *Goldman* v. *Beach Front Realty Co.* 83 N. J. L. 97, 99, 100, or a trackage contract for a stated period, *Union Pacific Railway* v. *Chicago, Rock Island & Pacific Railway*, 163 U. S. 564, and has the usual characteristic of a license, namely revocability, it does not follow that the license can be revoked by either party with impunity.

We think the Central New England Railway Company under the terms of the agreement can be held liable for breach of contract. Williston, Contracts, vol. 1, sec. 493. *McCrea* v. *Marsh*, 12 *Gray*, 211. *King* v. *David Allen & Sons, Billposting, Ltd.* (1916) 2 A. C. 54. *Kerrison* v. *Smith* (1897) 2 Q. B. 445. *United Merchants' Health & Improvement Co.* v. *American Billposting Co.* 128 N. Y. Supp. 666, 667. The promise of the Boston & Albany Railroad Company was not, therefore, purely illusory. The case of *Whittemore* v. *New York, New Haven & Hartford Railroad*, 191 Mass. 392, is clearly distinguishable; there the term of the agreement, 'that whenever said first party may find it necessary for the accomodation of its business to remove said spur track,' no claim for damages shall be made, was the decisive factor. The lease by the Boston & Albany Railroad Company to the New York Central Railroad Company did not revoke the license. Under the terms of the lease of the defendant and the Boston & Albany Railroad Company the former assumed all the obligations of the latter. It is clear, therefore, that the Boston & Albany Railroad Company did not intend to revoke the license by the assignment. It is not open to serious doubt that under the terms of the agreement between the Boston & Albany Railroad Company and the Central New England Railway Company, the duties of the former could be delegated. The seventh paragraph of the agreement provides in part that 'in case of a breach of any of the stipulations to be observed on the part of the New England Company or of those claiming under it, and a continuance of such breach for thirty (30) days, or in case the rights

under this contract shall be taken from said New England Company or its successor or transferee . . . the Albany Company or its successors may, while the default or neglect continues, . . . without any notice or demand, terminate this contract . . .' See in this connection Williston, Contracts, vol. 1, sec. 423. The defendant admittedly paid a sum of money annually over a period of nineteen years to the plaintiff or to its predecessor, the New York Central & Hudson River Railroad Company. See *Boston & Albany Railroad* v. *New York Central Railroad*, 256 Mass. 600, 609. Such action on its part prevents it from now objecting to the assignment. *Nelson Theatre Co.* v. *Nelson*, 216 Mass. 30, 34. *Saxeney* v. *Panis*, 239 Mass. 207, 210."

III.

BRIEF OF THE ARGUMENT.

A.

The State Court Had Jurisdiction of the Subject Matter of the Case (Respondent's Original Brief, pp. 33-34).*

(a) The jurisdictional question involves a consideration of the federal statutes relative to the Interstate Commerce Act, as amended by the Transportation Act of February 28, 1920, 41 Stat. at Large 456, 477, sec. 1, pars. 18 to 20 inclusive. Section 22 of the Act provides as follows:

> "*Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.*"

Interstate Commerce Act, as amended by the Transportation Act of February 28, 1920, 41 Stat. at Large 456, 477, sec. 1, pars. 18 to 20, inclusive:

> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, *and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.*
>
> "(19) *The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the provisions of this*

*Inasmuch as the question of jurisdiction of the state court lies at the threshold it will for that reason, first be considered.

Act shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints of the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, *and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby.* Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Section 207 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1148, Act of June 18, 1910, c. 309, sec. 1; 36 Stat. 539, being United States Comp. Stat. 1916, sec. 993:

"The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

"*First.* All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"*Second.* Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

"*Third.* Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

"*Fourth.* All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

"Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

"The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes."

Section 208 of the Judicial Code, Act of March 3, 1911, 36 Stat. 1148, Act of June 18, 1910, c. 309, sec. 1; 36 Stat. 539, being United States Comp. Stat. 1916, sec. 997:

"Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion,

may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit."

Act of October 22, 1913, c. 32, 38 U. S. Stat. at Large 219, being United States Comp. Stat. 1916, sec. 992:

"The Commerce Court, created and established by the Act entitled 'An Act to create a Commerce Court and to amend the Act entitled' 'An Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes,' approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed."

(*b*) Section 22, which has never been abrogated, was added at the end of the Interstate Commerce Act to preserve the jurisdiction of State Courts.

"But for this proviso to section 22 it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts and this clause was added to indicate that the Commerce Act, in giving rights of action in Federal courts, was not intended to deprive the state courts of their general and concurrent jurisdiction. *Galveston &c. R.R.* v. *Wallace*, 223 U. S. 481."

Penna. R.R. v. *Puritan Coal Co.*, 237 U. S. 129, 130.

In *Pennsylvania R.R. Co.* v. *Sonman Coal Co.*, 242 U. S. 120, this court said at page 123:

> "Thus we have held that a manifest purpose of the provision in section 22 is to make it plain that such 'appropriate common law or statutory remedies' as can be enforced consistently with the scheme and purpose of the act are not abrogated or displaced, *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446–447; that this provision is not intended to nullify other parts of the act, or to defeat rights or remedies given by earlier sections, but to preserve all existing rights not inconsistent with those which the act creates, *Pennsylvania R.R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 129; that the act does not supersede the jurisdiction of state courts in any case, new or old, *where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the federal courts is otherwise made exclusive, ibid,* 130."

(c) The action in this case lay in the state court because it was brought to enforce common law rights under a contract which was wholly unaffected by sections 18, 19 and 20 of the Transportation Act of February 28, 1920 and the right to bring such action has been specifically preserved to the respondent by section 22 of the Interstate Commerce Act. The precise administrative question decided by the Commission in this case was whether public necessity and convenience justified it in permitting the petitioner to abandon a portion of its road. Contractual rights were not involved. The Commission did not determine legal rights and obligations. It performed a purely administrative act. Later on in this brief, it will be argued that the Commission is without authority to determine legal rights and obligations; that under the provisions of the Transportation Act paragraphs 18 to 20 Congress did not authorize the Commission to sanction the abandonment by an interstate carrier of a contractual obligation such as existed between the parties in the case at bar with impunity. Howbeit, in mak-

ing the order in the instant case, the Commission performed purely an administrative function. A state court is not deprived of judicial powers over a subject because an administrative determination in the premises is provided for by the statute.* Where questions of law and not voluminous facts or discretionary administrative functions are involved, the courts may act without administrative determination. Ultimate review by the Federal Supreme Court secures uniformity of regulations and the supremacy of the authority of Congress.

Paragraph 18 of the Federal Transportation Act confers administrative authority upon the Interstate Commerce Commission to grant or refuse authority to abandon a part of an interstate railroad. This provision relates to a permissive remedy. It has no relation to contract rights or obligations.

> "The function confided in the Commission is comparable to that involved in a determination of the propriety or application of a rate, rule, or practice. It is the exercise of administrative judgment."
>
> *Texas & Pacific Rlwy.* v. *Gulf, etc. Rlwy.*, 270 U. S. 266, 373.

This is purely an action against the petitioner bottomed upon its failure to comply with its common law duty, and according to the decisions of this court respondent had the right to maintain this action under section 22 of the Interstate Commerce Act.

Vide: Eastern Railway v. *Littlefield*, 237 U. S. 140, 143.

It has been repeatedly held by this court that only those matters must first come before the Interstate Commerce Commission which involve administrative functions, such as rates, switching facilities, the rate of distribution of cars, and similar questions of practice; that the Commission did not first have to pass upon those questions which constituted a violation or denial of unquestioned legal duties of giving ser-

*State v. Atlantic Coast Line R. Co., 116 So. 48, decided Jan. 10, 1928.

vice as a common carrier *per se*. The Commission was given exclusive jurisdiction of administrative matters for the reason that therein *they were not deciding questions of law, or judicial questions, but questions of the reasonableness of rules, procedure, and business supervision* on which opinions might well differ; and therefore, to prevent contrary holdings on similar questions and to insure uniformity, the court holds the Commission's jurisdiction on such matters to be exclusive. To permit different courts or bodies to pass upon such questions might result in what one would hold reasonable on questions of rates, facilities, switching charges or car service, etc., another might hold unreasonable, thereby creating the discrimination that the act sought to avoid.

T. & P. R.R. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

L. & N. Railroad Co. v. *F. W. Cook Brewing Co.*, 223 U. S., 70.

Penn R.R. Co. v. *Puritan Coal Mfg. Co.*, 237 U. S. 121.

Eastern R.R. Co. of New Mexico v. *Littlefield*, 237 U. S., 140.

Hartman "Procedure and Proof Before The Interstate Commerce Commission" (1925).

The fact that the Interstate Commerce Commission was authorized to make this administrative determination relative to abandonment of part of the petitioner's road did not preclude the state court from enforcing common law remedies.

New York Central & Hudson R.R. Co. v. *Gray*, 239 U. S. 583.

Great Northern Railway Co. v. *Merchants Elevator Co.*, 259 U. S. 285.

It would have been a vain and futile thing for respondent to resort to the Interstate Commerce Commission for the

purpose of enforcing its legal rights that grew out of petitioner's breach of contract. On the other hand, if the petitioner believed that the Interstate Commerce Commission intended to include within its order a determination of legal rights and obligations arising out of the trackage contract in question, it should have taken action, through appropriate application, to remove the doubt by securing an expression by that Commission of the intention so to do.*

(*d*) The respondent made no attack open or covert upon the Commission's order or certificate relative to abandonment. The action is not brought to enjoin, set aside, annul or suspend in whole or in part the order of the Interstate Commerce Commission. As previously stated the Commission did not determine legal rights and obligations which arose out of the contract in question, even assuming that it was empowered to do so. For that reason alone the state court could determine the rights of the parties by virtue of its general jurisdiction.

(*e*) That the state court had jurisdiction to construe the order of the Interstate Commission is clear under the following authorities:

Great Northern Railroad v. *Merchants Elevator Co.*, 259 U. S. 285, 295.

Texas & Pacific Rlwy. v. *Gulf etc., Rlwy.*, 270 U. S. 266, 273.

Timken Co. v. *Penna. R.R. Co.*, 274 U. S. 181.

There is nothing in the statutes relied upon by the petitioner which deprives the state court of jurisdiction to entertain an action of this kind even if its decision is subject to review, in the discretion of this court.

Vide: New York Central & Hudson River R.R. Co. v. *Gray*, 239 U. S. 583.

Vide: Arkansas Comm. v. *Chicago, etc. R.R.*, 274 U. S. 597, 603.

B.

The Amended Interstate Commerce Act and Certificate and Order of the Commission Issued Thereunder do not Protect the Petitioner in this Action. (Respondent's Original Brief, pp. 22-31).

1. (*a*) The provisions of the Transportation Act relative to abandonment show no Congressional purpose to relieve railroads from their obligations to their creditors or to take from the latter any remedial process provided by the laws of the state.

The underlying reasons responsible for the provisions in the Transportation Act respecting abandonment are well known.* In Congressional Record, 66th Congress, 1st Session, Vol. 8, pt. 8, p. 8316, there appears among others the following statement before the House when this Act was under consideration:

> "Railroads sometimes desire to surrender the rights granted by their charter. The traffic is not what they expected, business conditions change, the natural resources they thought first to get out of the open market become depleted or become exhausted. There is no power now to restrain abandonment under Federal law. Railroads in many States can do as they will. We provide that there shall be some Federal control over the matter of abandonment, so that cities and villages that have been built up on these lines can be given due consideration by the regulatory body before the order for abandonment is issued. We give such control to the commission to investigate the situation and determine the facts. But neither provision, the building of new lines or the abandonment of old ones, affects spurs or switches or terminal tracks or interurban lines wholly within a State. These we leave to State control, where they already belong."
>
> See: Vanderblue & Burgess' work upon railroads, p. 299.

*Excerpts from the Congressional record which are annexed to this brief marked "A" disclose some of the reasons for enacting these federal provisions.

Already attention has been called to Section 22 of the original Act which provides in part as follows:

> *"And nothing in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."*

It is indisputable that the foregoing provision has not been repealed expressly or by implication by the Transportation Act of February 28, 1920. On the contrary, the above provision was in full force and effect when respondent's suit was brought in the state court. The Interstate Commerce Commission is authorized under paragraph 20 to make an administrative determination whether the present or future public convenience and necessity justify abandonment, but the enforcement by the state courts of common law or statutory remedies in case of disputed questions arising out of the legal effect of the Commission's permission to abandon is permissible under the provisions of the Act preserving existing remedies. State courts by virtue of their general jurisdiction can determine the rights of the parties where damages are claimed for failure to comply with contractual obligations notwithstanding that the Commisson has exercised an administrative judgment relative to abandonment. Under paragraph 20 of the Transportation Act, Congress has vested in the Commission authority to find the facts and thereon to exercise the necessary judgment.

> *Texas & Pacific Rlwy.* v. *Gulf, etc. Rlwy.*, 270 U. S. 266, 373.
> *Colorado* v. *United States* 271 U. S. 153, 166.

It was the purpose of Congress to entrust to the Commission only such matters affecting carriers as called for the judgment of a body of experts and all other matters being outside of the scope of the Commission's peculiar field are ordinarily left for the courts. It is difficult to reconcile any other theory with the principles that underlie the cases

defining the power of the Commission and the effect that must be given to its findings.*

Hence in determining whether public convenience and necessity permit of an abandonment the Commission exercises purely administrative judgment. The Interstate Commerce Commission is not a court. It has no judicial powers in the sense that it can adjudicate purely legal questions or rights arising out of contracts between carriers and third parties. When the Commission has exercised its administrative judgment and permitted an abandonment, the rights of a railroad and its creditors necessarily are to be determined by courts of general jurisdiction.**

In short when the Commission has discharged its administrative function relative to the propriety of permitting a railroad to abandon a portion of its road, it has wholly performed its statutory duty. For the Commission then to pass upon the rights of creditors or to adjust matters growing out of contractual obligations would be an usurpation of judicial power for its sole duty is to determine whether public interest and necessity justify it in permitting the railroad to abandon.

(*b*) Congress did not attempt to give to the Commission under paragraphs 18–20 judicial powers. By paragraph 20 it is provided that "the Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, *and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.*"

The words "and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require" relate to matters

*Vide: *United States* v. *Louis. & Nash. R.R.*, 235 U. S., 314, 320.

**Compare *Penn. R.R.* v. *Puritan R.R.*, 237 U. S. 121.

wholly unrelated to contractual rights of third parties. Public interest is not concerned with the rights of creditors after abandonment of a railroad has been sanctioned by the Commission. While the purpose of Congress was to put the railroad systems of the country "more completely than ever under the fostering guardianship and control of the Commission," Congress evidenced no intention to confer upon the latter the extraordinary right of terminating with impunity contractual obligations of third parties. Certainly it is not to be presumed that Congress intended to leave to the untrammeled discretion of an administrative body the power to take away vested rights.*

Paragraph 20 of the Transportation Act certainly cannot be construed to mean that under it the Commission may in their uncontrolled discretion take away contractual rights. Assuredly Congress has laid down no rule for the Commission's guidance in determining such important matters. Congress cannot delegate its power to make a law although it can make a law to delegate a power to determine some fact or state of facts upon which the law makes or intends to make its own action depend. Not having prescribed the rule or standard which is to control the Commission, necessarily the entire question would be left to its uncontrolled discretion which would be unconstitutional.

Vide: *Yick Wo* v. *Hopkins*, 118 U. S. 356, 359.
Comm. v. *Maletsky*, 203 Mass. 241.
Anzalone v. *Met. Comm.*, 257 Mass. 32, 37.

The purpose of paragraphs 18–20 is to permit railroads to abandon a portion of their roads where public convenience and necessity justify it, and to accomplish this the Commission is entrusted with the duty of investigating the facts and determining whether public convenience and necessity permit such abandonment.

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*It is very doubtful whether Congress could so legislate. *Vide:* 37 Harv. L. Rev. p. 741.

(*c*) The Commission however has no power under paragraph 20 to determine in its administrative discretion that public convenience and necessity require the abrogation of contracts.

There is nothing in the purpose of the statute nor in its language that indicates an intention to exempt carriers from all liability on their contracts or to provide any machinery for dealing with such matters. Certainly there is nothing in the Transportation Act which expressly empowers the Commission to pass upon contractual obligations. The grant of such an extraordinary power is not to be implied for the power itself is so vast and comprehensive, so largely affecting the rights of persons that no just rule of construction would tolerate a grant of such power by mere implication.

See: *Marshall* v. *Gordon*, 243 U. S. 521, at page 541.

Vide: Interstate Commerce Commission v. *Railway Co.*, 167 U. S., 494, 495, 501, 505.

(*d*) If Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Incorporating into the Transportation Act the administrative duties relative to abandonment and other subjects and directing the Commission to execute and enforce the provisions of the Act do not by implication carry to the Commission or invest it with the power to exercise important judicial functions. To say that Congress gave to the Commission the right to impair or destroy legal rights under contracts is to build up indirectly and by implication a power which is not in terms granted. It is not to be supposed that Congress would ever authorize an administrative body to usurp judicial functions in such a manner and to evolve as it were out of its own consciousness the satisfactory solution of the difficult problem of administering distributive justice between railroads and their creditors or to relieve the former from their obligations to the latter. *If it had intended to*

grant such extraordinary power, it would have said so in unmistakable terms.

(c) If this Court decides that in enacting the Transportation Act Congress conferred the power upon the Commission to abrogate the contract in this suit, then the conclusions of the state court (Record, pp. 69, 70) are correct for reasons stated therein.*

The state court "assumed that Congress, in enacting the Interstate Commerce Act, section 1, paragraphs 18–20, as amended by 41 U. S. Stats. at Large 456, 477, 478, authorized the Commission to sanction the abandonment by an interstate carrier of a contractual obligation, such as existed between the parties in the case at bar, with impunity."** Upon the foregoing assumption *the state court decided that the Commission did not exercise the authority which it assumed it had, and held that the certificate of the Interstate Commerce Commission is not a defense to this action for the reason "that it does not appear by express words or by clear implication that the Commission intended to deprive the Boston & Albany Railroad Company . . . of its rights under the agreement. . . ."*

Irrespective of whether the provisions of federal law show Congressional purpose to confer upon the Interstate Commerce Commission the power by implication to abrogate contractual rights with impunity when they issue a certificate of convenience and necessity relative to abandonment, it is indisputable that such power was not exercised in the instant case.

II. It has been shown under "I" that Congress did not vest in the Commission the uncontrolled power to abrogate contractual rights when it issues its orders relative to abandonment. It is equally plain that the provisions of the Transportation Act relative to that subject show no Congressional purpose that the Commission's order should by force of the

*The attention of the court is particularly called to respondent's brief in opposition to the petition for certiorari at pages 17–22.

**Record, p. 67.

federal statutes relieve the railroad from its obligations to creditors. The purpose of paragraphs 18 to 21 of the Act relates to the construction, acquisition, extension and abandonment of a railroad. "They deal primarily with rights *sought to be exercised by the carrier.*"*

The purpose of those paragraphs respecting construction, acquisition and extension is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in public interest.** The provisions relative to abandonment are not mandatory. The certificate issued by the Commission under the Act is permissive only. Attention has been called to the situation which Congress intended to remedy in providing for abandonment.*** In this connection we direct your attention to what is said on pages 22 and 23 of our original brief in opposition to the petition for writ of certiorari.

> "Sometimes railroads could abandon their entire lines because they had become so unprofitable that to compel them to run trains was confiscatory. Sometimes their charter or contractual relations were such that they could abandon their roads only with the permission of the state or states under which they were organized. And sometimes their charters were subject to forfeiture or they were compelled through receivership proceedings to sell their roads to satisfy the claims of their creditors.
>
> "When Congress, after the close of Federal control taken during the war, sought 'affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country,' it deemed it wise to put an end to this heterogeneous control, and to put the protection of the public interests in the hands of the Inter-

*Cleveland etc. Ryway. v. U. S., 275 U. S. 408.

**Vide: Railroad Commission of Wisconsin v. Chic. & Burlington & Quincy R.R. Co., 257 U. S. 563; The Chicago Junction Case, 264 U. S. 258; Railroad Commission of California v. Southern Pacific Co., 264 U. S. 331; Texas & Pacific Ruy. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U. S. 266; Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co., 271 U. S. 244.

***Vide: page 20 of this brief.

state Commerce Commission. In doing so it dealt not merely with the abandonment of roads, but also with their construction, giving to the Commission the power to decide in either case whether the proposed construction was required or the proposed abandonment permitted by public convenience and necessity. 'The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.' 'The sole test prescribed is that abandonment be consistent with public necessity and convenience.'

Colorado v. *United States*, 271 U. S. 153, 166, 168."

No railroad is required to apply to the Commission for action under the abandonment provisions. If it does so, its application is purely voluntary. The only mandatory feature about it is that the railroad cannot abandon without first obtaining a certificate of the Commission. This is prohibitory rather than mandatory. There is nothing in the Act which prevents a petitioner from postponing its action under the certificate or from failing to exercise the permission. Neither is there anything in the Act which prevents a railroad which has obtained permission to abandon a portion of its railroad, from thereafterwards securing the right to operate again.

The purpose of paragraphs 18 to 21 of Section 1 is not to compel abandonment in the interest of interstate commerce but to restrict it for the purpose of protecting the public interests against unreasonable abandonment. The certificate issued by the Commission under the Act is permissive only.* The legislation covers total and partial abandonment. In the instant case the petitioner chose to abandon on December 15, 1921 about three months after the certificate of the Interstate Commerce Commission had issued but there is nothing in the Act which prevented the petitioner from continuing to operate the road for a period of years and as previously stated, there is nothing in the Act which necessarily prevents a rail-

*Vide: *State* v. *Atlantic Coast Line Co.*, R. 116 Southern, 48, 53.

road from obtaining permission to again operate that part of its road which it has been permitted to abandon. Moreover, the Commission is empowered to permit total or partial abandonment for reasons unrelated to the question whether further operation will result in loss.

(*a*) The vice of petitioner's reasoning lies in the fact that it is imputing to Congress an intention which is not reasonably implied. Undoubtedly Congress had in mind, among other things, the effect upon interstate commerce due to further operation of an unprofitable road or a branch thereof and because of such burden it empowered the Commission to permit a railroad to abandon if the latter applied for permission to do so.

(*b*) *When abandonment takes place pursuant to the Commission's order, the burden upon interstate commerce which Congress had in mind has been removed. Congress did not concern itself with the legal rights of parties who might be affected by the abandonment.* The Act affords no protection in contractual matters either in the case of total or partial abandonment, and in testing the correctness of that statement the matter must be scrutinized from the standpoint of both total and partial abandonment. If the Act cannot be invoked as a defense to contractual rights in the former, it cannot be in the latter for it would be absurd to say that Congress intended that property rights should be injuriously affected in one case but not in another. The importance of this is manifest when petitioner's contentions in the instant inquiry are examined. Petitioner claims that interstate commerce would be burdened if it should be required to make payments under the contract or to respond in damages and consequently it is entitled to immunity. Suppose that this were not a case of partial abandonment but that of a total one, what becomes of contractual obligations in that event? Assuredly it could not be asserted that there interstate commerce was burdened because the road would be no longer in operation. If the carrier is to receive exemption in such a case as that, it would be because of reasons wholly unrelated

to interstate commerce. What is the criterion to be applied in this matter if it should be held that the federal Act permitting abandonment evinces a Congressional purpose to exempt a road from contractual obligations?

In determining whether Congress by implication intended to legislate relative to contractual rights, it is obvious that the nature of the same is wholly unimportant, *for it would be absurd to say that Congress had any intention of creating a preferential class of creditors in such a matter.* It would be equally absurd to say that Congress intended to make any distinction between executory and executed contracts. Congress certainly had no intention of favoring one class of creditors over another.

(*c*) Obligations arising out of mortgages, leases, trackage contracts, and claims for personal services all must be treated alike in the case of abandonment under the Act, unless there is to be attributed to Congress the purpose of providing a railroad a sort of civil sanctuary in the case of one class of debts and to refuse it in another. No such contention can be sound.

Reduced to its final analysis, the contention of the petitioner in this case is that the federal statutes relative to abandonment may be invoked to relieve carriers of the burdensome effect of all contracts as well as other possible liabilities.

In the petitioner's brief, p. 41, it is stated:

> "Recent decisions of the Interstate Commerce Commission showing the extent to which the Commission has acted under paragraphs 18 to 22 of Section 1 of the Transportation Act in relieving carriers of the burdensome obligations of special contracts are:
>
> *Central v. Hereford Rlwy.*, 99 I. C. C. 7.
>
> *Abandonment of Branch Line by N. Y., N. H., & H. R.R.*, 82 I. C. C. 45.

The second of these two cases is helpful because it shows (82 I. C. C. 46) that upon the issuance of a cer-

tificate of abandonment the carrier authorized would, by force of the statute, be relieved from burdensome obligations under mortgages."

(Italics are ours.)

The two cases cited are inapplicable and counsel's statement relative to the second one is incorrect.

At page 46 of 82 I. C. C. it is stated:

> "In 1918, the last year of operation, the total freight tonnage was 378 tons and the revenue from passenger traffic was $5.74. It is claimed that the decrease in traffic has been due principally to the use of motor trucks and automobiles. *The applicant represents that there is no apparent need for resumption of the service discontinued during the Federal control period and that it is desirable that the line be abandoned so that it may be relieved from the obligations under its existing mortgages to maintain the property in good operating condition.*"

Without inquiring too closely whether petitioner's counsel has not confused applicant's wishes in that case to be relieved from existing mortgages with the order which did not attempt to pass upon the question at all, it is obvious that the case does not support counsel's assertion.

(d) *Thus it appears from counsel's own admissions in this case that its contention is not confined to obligations arising out of trackage contracts but includes such burdensome obligations as mortgages. Indeed to be consistent, counsel had no other alternative. However much petitioner may intend to and try to ignore and avoid it, at times, the situation is clear that the principle involved in the present inquiry vitally affects contracts of every name and description. The question therefore is this: Do the provisions of the Transportation Act relative to abandonment show Congressional purpose to relieve railroads from their obligations to their creditors if the Commission issue a certificate permitting the abandonment of a road or a portion thereof?*

In the case of total abandonment, can it for a moment be seriously believed that Congress intended that a heavily

mortgaged railroad should gain complete immunity when the Commission's order issued, or that creditors with claims arising out of leases, trackage contracts, and contracts for personal services should be remediless by force of sections 18 to 21 of the Act? Exemption under the federal statutes certainly could not be invoked under the guise of protecting interstate commerce inasmuch as the road had manifested an intention to discontinue further operation. In the case of partial abandonment is it possible to read into the Act a Congressional purpose to make a distinction in the case of mortgages, leases and other contracts? Such a distinction as this seems fanciful. The petitioner, however, seeks to avoid these insurmountable obstacles by arguing that in the case of partial abandonment a road would be burdening interstate commerce if after the issuance of the Commission's order, it complied with its contractual obligations or was required to respond in damages resulting from its refusal to do so.

The burden upon interstate commerce however in the sense contemplated by Congress is removed when there is no further operation. The effect upon interstate commerce due to discharging its obligations may or may not be *even remote*. If petitioner's contention is sound, it would be immune from the payment of a hundred dollar indebtedness, notwithstanding that such a picayune matter could not possibly have any effect upon commerce. The fact that the amount is small or large cannot affect the inquiry in the slightest degree. Assuming, however, that the payment is a large one such as in the instant case in no aspect of the matter is interstate commerce injuriously affected in the sense that Congress had in mind when it enacted the Transportation Act. Mortgage and lease obligations as well as those arising under trackage contracts can have no effect upon interstate commerce except in the remotest degree. Petitioner cannot hunt with the hounds and run with the hares. The right which it exercised in this case was one which it availed itself of to relieve against (according to its assertions) an unprofitable

operation of a part of its road. While it is true that "the certificate issues not primarily to protect the railroad but to protect the interstate commerce from undue burdens or discrimination," nevertheless it would be sheerest nonsense for this petitioner to say that its purpose in exercising the right under paragraphs 18 to 20 of the Transportation Act was to relieve interstate commerce. *Its voluntary action really was to relieve itself from the consequences of an unprofitable venture. Hence in availing itself of the permission accorded under the Act it cannot take the position that it should be relieved from burdensome contracts after it has abandoned part of its road, upon the ground that otherwise interstate commerce would be injuriously affected.* Such solicitude is altogether too ingenuous.

To suit its purpose, the petitioner has assumed that the mere existence of a trackage agreement, the ability to use which has been cut off at least temporarily by a permissive order of the Interstate Commerce Commission to abandon a part of or all of one of its branches, creates a liability which it must by operation of law rid itself of or else the very purpose of the Act is defeated. We have already replied briefly to the argument. Now let us go one step further. It is conceivable that a petitioner in a similar situation might, to reduce its present expense, petition the Commission to authorize it to abandon a part or all of its line connecting with the tracks of another road over which under the agreement it had the right to operate its trains. There might be a great future in that territory so that the petitioner might believe that it was a great benefit to keep alive the trackage agreement by making the payments due thereunder even though it operated no trains, so that with future development it would have an access to that territory, while if it abandoned altogether the agreement it might not be able to negotiate another such favorable one. The directors might well believe it was a valuable asset for future business which should be retained, but that operation of trains over its branch line to the connection should be abandoned until the

development warranted renewing operations thereover. Before it could abandon the operation of trains to the connection it would have to obtain a certificate from the Commission, the legal effect of which, according to the petitioner, would be to terminate once and for all that agreement, thus depriving the company of a very valuable asset. This would result in the judgment of the Commission being substituted for and forced unwillingly upon the directors. And it is conceivable that the order might be made with as little examination of the agreement and as slight consideration of the rights of the parties thereto as appeared in the instant case. Surely Congress intended no such result.

Another interesting question arises. Assuming that the petitioner is correct, when does the contractual obligation become void? Is it when the order of the Interstate Commerce Commission issues, or only at such time as the petitioner chooses to exercise it? If the former, then the petitioner could have been prevented at once from operating over the Boston & Albany, unless it so happens that the petitioner could avail itself of the benefits of the order but the respondent could not. If the latter is the correct view, then the Boston & Albany is subject to the whim of the Central New England Railway Company, which may or may not abandon promptly. In other words, the petitioner in such a case has full control over the enforcement of the law.

If a railroad can be relieved of its obligations by the issuance of a certificate permitting it to abandon a part of its road, then Section 22 of the Act (which has not been modified) preserving existing remedies is but an idle form. To imagine that a railroad can receive a white-washing of all its obligations by securing a certificate of abandonment is pure nonsense. The contention of the petitioner rests upon the shakiest hypothesis, because interstate commerce is not burdened in any direct sense by its contractual obligations notwithstanding originally *it may have been by the operation of its road*, for inasmuch as it has ceased to operate *the burden has been removed.* When that is considered, the storm

of emotionalism created by petitioner respecting interstate commerce and the fostering guardianship of the Commission is entirely swept away, and the stark fact remains that after all the petitioner is seeking to avoid its obligations for the purpose of benefiting itself and not commerce.

Petitioner is unduly exercised over the effect of contractual obligations upon interstate commerce. Whether an abandoning road that complies with its contractual obligations may find the same a drain upon its resources, necessarily depends upon the character of the obligation and the extent of its resources. The matter is wholly conjectural. Moreover, it is pure guesswork whether any drain upon a carriers resources will even remotely affect interstate commerce.

(e) *It would be futile to pretend that Congress intended a rich and powerful carrier who chose to abandon a part of its road to be relieved of its obligations to creditors under the Interstate Commerce Act as amended or intended to have the Courts draw any distinction between prosperous and weak roads in determining what class of creditors and what kind of contracts should be injuriously affected by the Act.*

The propriety of permitting a railroad to abandon (which is left entirely to the administrative judgment of the Commission), presents an entirely different question than in the case of interfering with contractual rights of creditors after abandonment has taken place, because in the latter there is no satisfactory way of discerning whether the payment of an indebtedness is a drain upon the road's resources, or whether its extinguishment is in the interest of commerce.

(f) In consequence of these many problematical matters, it is indisputable that Congress had no intention of permitting an abandoning road to escape its contractual obligations. By what twist of the brain is it possible to evolve the notion that interstate commerce will be benefited if the respondent in the instant case should be required to pay over to the petitioner the amount of the judgment? If creditors' rights in the case of abandonment of a railroad are to be determined according to their burdensome effect upon inter-

state commerce there would be utter chaos in the courts resulting from the extreme difficulty of determining what contracts may be said to be burdensome upon commerce and what class of creditors are to be affected.

In the case of total abandonment interstate commerce is in no wise affected by any theory whatsoever. Where partial abandonment has been permitted no direct* interference with interstate commerce can arise where a railroad is forced to do no more than to pay its honest debts. It is a far cry indeed to say that the payment of the judgment in this case is such a drain upon the railroad as to constitute a burden upon interstate commerce.** This court has sustained the exercise of the state police power relative to the elimination of grade crossings. *Such legislation sometimes imposes staggering financial burdens upon the railroads, which in the case of weaker lines engaged in commerce might even result in their bankruptcy. The court has held that even the prospect of bankruptcy of an interstate carrier is not sufficient to invalidate state legislation requiring it to expend its funds for the elimination of grade crossings.*

Erie R.R. v. *Public Utility Commissioners*, 254 U. S. 394.

Lehigh Valley R. Co. v. *Board of Public Utility Commissioners*, 49 Supreme Court 69, decided November 19, 1928.

Vide: Board of Hudson River Regulating District v. *Fonda*, 249 N. Y. 445, decided December 31, 1928.

It is clear therefore that where there is abandonment the rights of railroad creditors are not injuriously affected by force of paragraphs 18 to 20 of the Transportation Act.***

Vide: Shafer v. *Farmers Grain Co.* (1925) 268 U. S.—189, 199.

**Certainly there is nothing in the record to justify such an absurd assumption.

***It is too plain for argument that respondent is a creditor. "The word 'creditor' is ordinarily used as an antonym of 'debtor' and involves a debt and a credit. It commonly signifies one who holds some contractual obligation against another." *Boston* v. *Turner*, 201 Mass., 190, 193.

The judgment in this case does not conflict with the provisions of federal laws or orders, nor does it burden interstate commerce.

In a case before this court* the contention was made that the provisions of federal law requiring railroads to provide continuous interstate transportation over connecting lines are violated by the enforcement of provisions of a state law permitting the attachment of cars owned by an interstate carrier in a suit brought by its creditor. It was claimed (page 176) that "to permit the instrumentalities used in the interchange of traffic by railway common carriers to be seized on process from various state courts does directly burden and impede interstate traffic within the inhibition of the acts of Congress." The court, however, sustained the attachment and stated that the provisions of federal law showed no Congressional purpose to relieve railroads from their obligations to their creditors. At page 178 the court said:

> "The Interstate Commerce Law therefore is directed against the acts of railroad companies which may prevent continuity of transportation. Section 5258 of the Revised Statutes was directed against the trammels of state enactments then existing or which might be attempted. In neither can there be discerned a purpose to relieve the railroads from any obligations to their creditors or take from their creditors any remedial process provided by Federal law as well."

III. There is no useful analogy between this case and the rate cases upon which the petitioner places so much reliance.

(*a*) Rates are clearly mandatory, and do not depend upon their acceptance by the railroads.

(*b*) Some of their features are expressly fixed by statute, and contracts in conflict therewith are made unlawful.

(*c*) This Court has never shown any disposition to deprive parties, even in those cases, of any remedy when justice seemed to require one.

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*Davis v. C. C. C. & St. L. Ry., 217 U. S., 157.

Louisville & Nashville R. Co. v. *Mottley*, 219 U. S. 467, often cited as sustaining the petitioner's contention, merely denies the right of specific performance and declines to consider whether the plaintiff had some other remedy.

In *New York Central & Hudson River Railroad Co.* v. *Gray*, 239 U. S. 583, where Gray had received a contract for transportation in part payment for his services as an architect, which contract the railroad was prohibited from performing by the Hepburn Act, it was not only held that he was entitled to recover, but that his action was properly brought in the state court (the City Court of New York), this Court saying that in permitting recovery the state court "was simply administering the applicable principles of state law, and did not run counter to the Act of Congress."

In *Ortega Co.* v. *Triay*, 260 U. S. 103, a suit to enjoin a receiver from collecting rates on an electric railroad in excess of those fixed by contract, it was held that the injunction was properly denied, but the Court further said: "Necessarily, therefore, we affirm the action of the District Court, but while this denies the relief the Ortega Company prays against the appellee, we do not wish to be understood as adjudging that the company may not be entitled to some remedy for the non-observance of the contract of the Tacoma Company. See *Louisville & N. R. Co.* v. *Crouch*, 156 Ky. 27; 160 S. W. 750."

For other cases in which it was intimated that a refusal of specific performance was not to be regarded as a denial of any other remedy, we refer to the following:

Armour & Co. v. *Dallas*, 255 U. S. 280, 286.

Beasley v. *Texas & Pacific Ry. Co.*, 191 U. S. 492, 496, 497.

Louisville & N. R. Co. v. *Johnson, Admx.*, 207 Ky. 813.

Louisville & N. R. Co. v. *Letcher County C. & I. Co.*, 243 S. W. 45.

C.

The agreement of October 25, 1899, between the petitioner and the respondent is a trackage contract for a stated period, which is not terminable at will, and under its terms the annual payments, which were in consideration of the right to use the trackage facilities of the respondent, were to be made irrespective of the petitioner's use therof, and such payments were not excused by the petitioner's voluntary conduct in obtaining permission to abandon a part of its line the operation of which was necessary to the continued use of the trackage facilities of the respondent (Respondent's original brief, pp. 31-33).

(a) The agreement is a trackage agreement not terminable at the will of either party.

There is no question that the trackage agreement was not a revocable license. If there ever was any substantial question on this point, it is not here open to the petitioner (1) because this was a Massachusetts contract made and to be performed in that state and its construction involves no federal question; (2) because the petition for certiorari presents no such question, and (3) because the validity of the contract and its performance by the respondent and its assigns are conceded in the stipulation of the parties. (Record, p. 81).

The federal questions raised by the petition for certiorari already have been referred to.* It appears therefrom that the federal questions raised relate solely to the state court's jurisdiction of the subject matter of the case, and to the legal effect of the certificate and order of the Interstate Commerce Commission.

Throughout the petition for writ of certiorari and accompanying briefs, petitioner makes no claim that the agreement sued upon was a revocable license. On the contrary petitioner consistently treats this agreement as a valid contract for a definite stated period. Moreover it is provided in the stipulation (Record, page 81) "that said petition does not

*Vide: page 5 of this brief

present and is not intended to present any question as to the legal execution and validity of the contract in suit except as it may be claimed to have been affected by the order of the Interstate Commerce Commission issued September 8, 1921."

The agreement was to be performed wholly in the state of Massachusetts, and its construction affects a purely local question on which the state should have its own way.* Inasmuch as the interpretation of the contract in this case has no rational relationship to the federal questions presented upon this certiorari proceeding, a different construction by this court from that given to the contract by the state court would introduce into the jurisprudence of the state of Massachusetts the discordant elements of a substantial right which is protected in one set of courts and denied in the other. If, nevertheless, this court reserves the right to construe the contract itself because of the nature of the questions raised, as in *Railroad Commissioners of Texas* v. *Eastern Texas R.R.*, 264 U. S. 79, and because the court feels free to exercise its own independent judgment in determining questions of general law,** we submit that the conclusion reached by the state court is correct, and that it was an agreement binding upon both parties up to August 30, 1940, unless of course the federal questions raised by the petitioner are applicable and determinative of the matter.

Even if the court should feel inclined to construe the contract in question "*for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.*"***

The admissions of the petitioner in its brief in support of the petition for writ of certiorari clearly demonstrate that the contract was a permanent and irrevocable one. At page 9, it said:

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*Vide: *B. & W. Taxi Co.* v. *B. & Y. Taxi Co.*, 276 U. S. at p. 535; 37 Harvard Law Review 49, at pp. 81-88.

**Vide: *B. & W. Taxi Co.* v. *B. & Y. Taxi Co.*, 276 U. S. at p. 530.

***Sim v. *Edenborn*, 242 U. S. 131, 135.

"This contract was executed as a result of a previous agreement, dated May 9, 1898 (Exhibit 28), between The Boston & Albany Railroad Company, the Philadelphia, Reading & New England Railroad Company, its reorganization committee, and The Hartford & Connecticut Western Railroad Company. This earlier agreement contemplated the organization of your petitioner and the construction of a branch line to connect with the lines of The Boston & Albany upon the location and construction of which your petitioner and The Boston & Albany Railroad Company were to make the contract sued on. The branch line was to be constructed from the south through Feeding Hills, Connecticut, to a point of connection on The Boston & Albany known as Agawam Junction, a distance of four miles from the City of Springfield. The petitioner was to run its trains into Springfield over the tracks of The Boston & Albany under the license provided for by the contract sued on. The branch line was to be the only physical connection between the rails of the petitioner and those of The Boston & Albany. The only way that the petitioner could use The Boston & Albany tracks covered by the contract was by coming from the south through Feeding Hills over this new branch line.

"Within a month after the execution of the second contract (Exhibit 3) The Boston & Albany Railroad had been leased, by Exhibit 1, to the corporate predecessor of the New York Central Railroad Company.

The branch line was completed in 1902 and was operated for approximately nineteen years, until revenue and expenses for the operation from Feeding Hills into Springfield showed a loss for the year 1920 alone of $38,812.58 (Exhibit 32)."

It would seem to be absurd in the face of the foregoing admissions to argue that under the circumstances which the petitioner says accompanied the making of this agreement, either the petitioner or respondent could have terminated it at will. What would the petitioner have said if, after the construction of the branch railroad and the opening of the same for passage of trains, the Boston & Albany Railroad Company had given notice that it would not permit it to use its tracks? Its disappointment would have been complete

and justly so, for it had relied upon the contract as the means of promoting its enterprise.* The provisions of the contract clearly reveal that the contracting parties contemplated an enforceable agreement of a permanent character entirely inconsistent with a revocable license. The first clause shows that the parties contemplated the contract to continue until the thirtieth day of August, 1940, which it so happens is the date of the expiration of its lease of The Hartford & Connecticut Western Railroad under the terms of which it operates trains between Feeding Hills and Agawam. This clearly refutes the notion that it could be terminated by either party upon notice. It is true that the agreement does not contain definite language relative to the petitioner's obligation to avail itself of the rights thereunder during the stated period but the only reasonable construction which can be given is that the parties intended the agreement to be of a permanent character and not terminable at will, but co-extensive with the expiration of The Hartford & Connecticut Western Railroad lease.

It is of no consequence what exact phrase should be given to the agreement for it is not upon the use of any description that the rights of the parties in any way depend. What it was styled by the parties does not determine its character or their legal relations. Contracts of a similar nature frequently have been construed by American and English courts. The Federal Supreme Court on many occasions has termed an agreement of this kind as being a contract for trackage rights rather than a lease.

In *Union Pacific Rlwy. Co.* v. *Chicago, etc., Rlwy. Co.*, 163 U. S. 564, Mr. Chief Justice Fuller speaking for the Court at page 582 said:

> "Taking up the contract with the Rock Island Company, what is the nature of the undertaking of the Pacific Company? In several places in this instrument it is called a 'lease' and the parties are called 'lessor' and

*Vide: *M'Neil* v. *Chesapeake & O. Ry. Co.*, 175 F.2d. 321, 330.

'lessee'; while, on the other hand, in the record of the proceedings of the executive committee of the Pacific Company and of its stockholders, it is called an agreement 'granting trackage rights' between Council Bluffs and South Omaha. But what it was styled by the parties does not determine its character or their legal relations, and in its interpretation the rule applies that 'the court is not only at liberty, but required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject matter of the contract and the circumstances under which it was signed.' *Rock Island Railway Company* v. *Rio Grande Railway Co.*, 143 U. S. 596, 609.

"The contract in this regard was really an agreement for trackage rights, for running arrangements, a 'terminal contract' with compensation on a 'mileage' or 'wheelage basis,' rather than a lease."

See: 1 *Elliott on Railroads* (3rd edition) at page 750.

The English courts in construing contracts of a similar nature sometimes have referred to them as "licenses" of a permanent character. It is obvious that the reluctance shown by judges to use the word "license" in its ordinary sense grew out of the fact that the courts held that the contracts which were considered by them were not of a revocable nature, notwithstanding that in many instances there were no words fixing the duration of the agreement.

Vide: *Great Northern Railway Co.* v. *Manchester, Sheffield, etc., Rlwy. Co.*, 5 De Gex & Sm. 138.

Llanelly Ry. & Dock Co. v. *London & N. W. Ry. Co.*, L. R. 8 Ch. App. 942.

King v. *David Allen & Sons Bill Posting Ltd.*, 2, Appealed Cases, 1916, 54, at page 59.

As previously stated, contracts similar to the one in this action have been declared irrevocable by the Federal Supreme Court.

Vide: *Joy* v. *St. Louis*, 138 U. S. 1.

Union Pacific Railway Co. v. *Chicago, etc., Railway Co.*, 163 U. S. 564.

Texas & P. R. Co. v. Louisiana Public Service Commission, 12 F. (2nd) 798.
Western Union Telegraph Co. v. G. R. & Banking Company, 227 Fed. 276.
Franklin Tel. Co. v. Harrison, 145 U. S. 459.

Even if the agreement in question is to be construed as a license, it is not a naked one which is revocable at the pleasure of either party. The great weight of authority is to the effect that under most circumstances a naked license may be revoked at the pleasure of the licensor, but an executed license for a term and for a consideration cannot be revoked.

Vide: R. H. White Co. v. Remick & Co., 198 Mass. 41.
King v. Allen & Sons Bill Posting Ltd. (1916) 2 Appealed Cases, 54.
10 A. L. R. 1110.*
United Merchants R. I. Co. v. American B. Co., 128 N. Y. Supp. 666.

It is significant to note that in the questionnaire to the Central New England Railway Company by the Interstate Commerce Commission,** Mr. Bardo, President of the defendant railroad, used the following language:

"On August 25th, 1899, the Central New England Railway Company *entered into a contract* with the Boston and Albany Railroad Company supplemental to the contract of May 9th, 1898, but for the same term; namely, August 30th, 1940, providing for joint facilities and trackage rights between Agawam and Springfield, this contract providing that the Central New England Railway Company shall pay to the Boston and Albany Railroad Company $15,000.00 per annum, payable quarterly, if not more than three freight trains of thirty cars each in each direction shall be run and not more than three passenger trains in each direction, whatever number above this shall be run, the rental shall be increased in

*Note contains numerous instances of irrevocable licenses.

**Vide: page 15 "Original Exhibits."

proportion to the increase of traffic. *This agreement is in force at this date.*"

Nothing is stated in the questionnaire which even suggests that such contract was a mere revocable license.

(*b*) The state court properly ruled* that the agreement "*indicates that the annual payment was to be made irrespective of use. It was consideration paid for the right to use and not for the use, and as so construed it does not involve a forfeiture.*" (Italics are ours).

(*c*) When the contract was executed October 25, 1899 by its terms the Boston & Albany Railroad Company gave to the Central New England Railway Company the right to use its tracks until August 30, 1940. The right therefore on that date for the period stated had been unconditionally transferred to the other road for a certain definite amount of money. It makes no difference whether the consideration for obtaining that right was to be paid by instalments during the term or was a sum in gross, because the fact remains that the right to use the tracks had been given to the Central New England Railway Company from October 25, 1899 to August 30, 1940 and hence the Boston & Albany Railroad Company and its assignee could not be affected by what took place afterwards.

(*d*) *The consideration was for the right to use and not for the use. If the Central New England Railway Company did not see fit to avail itself of its right or voluntarily placed itself in a position where such right would be unavailable, nevertheless its obligation to make the payments is unaffected thereby.* The contention of petitioner that its obligation to pay "was not general but distinctly limited to the existence of that branch,"** is untenable.

(*e*) *Vested rights took place when the bargain was made. The subsequent conduct of petitioner in applying for permission to abandon, cannot prevent a recovery of what was stipu-*

*Record, p. 70.

**Petitioner's final brief, p. 41.

lated upon October 25, 1899. It does not lie in petitioner's mouth to contend that it is to be excused from its obligation to pay because it has received permission to abandon. Petitioner's failure to exercise its right to use the tracks did not result from operation of law. It was the direct result of its own conduct in availing itself of its rights under the Transportation Act. Petitioner for reasons personal to itself exercised those rights and received permission to abandon a portion of its road and after receiving the permissive certificate, it ceased operations and since then has not chosen to avail itself of its rights under the agreement of October 25, 1899. As previously shown the Act is permissive, not mandatory. With reference to abandonment, under paragraphs 18 to 20 it is left wholly optional with the carrier whether it will exercise the right to apply for permission to abandon.

(*f*) The court is not concerned in this case with a situation where performance of a contract has been rendered impossible by an act of Congress passed after the contract was made. Under the provisions of the Transportation Act, Congress did not make any provisions for compulsory abandonment. The situation in the instant inquiry, briefly summerized, is this. After making the contract sued upon, petitioner desired to cease operating a portion of its road and pursuant to the provisions of the Transportation Act it secured permission to do so. It now claims that because the rights transferred to it to use the tracks of the respondent's road are no longer necessary, it may breach its contract of October 25, 1899 upon the ground that the latter was executed upon the implied understanding that it should use the tracks from October 25, 1899 to August 30, 1940. Such a claim wholly ignores the character of the agreement. Moreover such claim is not well founded in law. In *Osborne* v. *Nicholson*, 13 Wall. 654, this court said at page 659:

> "But we think the exact point here under consideration was settled by the Court of Queen's Bench in *Mittelholzer* v. *Fullarton*. That case so far as it is necessary to state it was this: The contract was made at Barbice, in British

Guiana. The plaintiff sold to the defendant the services of one hundred and fifty-three apprentice laborers who had been slaves, for £7,800, *payable in six annual instalments of £1,300 each*. The defendant paid four instalments. The apprentices were then declared free by the local governor and council. The defendant refused to pay the two last instalments. The suit was brought to recover them. The court held that the plaintiff was entitled to judgment, 'though the legislature had determined the apprenticeship before they became due.'"

Vide: Grimsdick v. *Sweetman*, King's Bench Division (1909) 2, p. 740.

Halsey v. *Lowenfeld*, King's Bench Division (1916) 2, p. 707.

If it can be said that the rules relating to impossibility of performance resulting from operation of law have any application in the instant case (which respondent denies) it is indisputable that the petitioner created such impossibility of performance by applying to the Interstate Commerce Commission for permission to abandon that part of its road covered by the contract. It is fundamental that impossibility arising from the promisor's own act is not in any case an excuse for non-performance of his contract.

The Laws of England (Earl of Halsbury) Vol. 7, p. 432.

As stated by the state court in *Proctor* v. *Union Coal Co.*, 243 Mass. 428, 432, "undoubtedly the defendant had a legal right to sell the land and ice-houses. But if it exercised that right and thereby deprived itself of the means of supplying ice in accordance with its contract, to the plaintiff's prejudice it became responsible in damages."

Performance of the contract sued upon has not been rendered unlawful in the sense that term has been used by courts.

(g) Impossibility of performance is not the result of any prohibitory regulation upon the part of the Interstate Commerce Commission but is solely due, if at all, to the voluntary act of the petitioner in applying to that body for permission to discontinue a part of its road.

As previously shown there is nothing contained in the provisions of the Transportation Act which justifies any inference that because permission may be given to a carrier to abandon its road the railroad may thereupon repudiate its contractual obligations. It is wholly unimportant that the abandonment in this case has made petitioner's right to use the tracks unavailable, because petitioner itself has created that situation. In bankruptcy, insolvency, and receivership matters frequently the claim has been made that performance of contracts is excusable, but neither bankruptcy nor insolvency constitute a legal excuse for the nonperformance of a contract.

Vide: Central Trust Co. v. *Chicago, Auditorium Co.*, 240 U. S. 581.

City of Montpelier v. *National Surety Co.*, 97 Vt., 111.

Isaac M'Lean Sons Co. v. *William S. Butler & Co.*, 227 Fed. Rep. 325.

Lewis v. *Atlas Mutual Life Ins. Co.*, 61 Mo. 534.

If petitioner finds the right to use trackage facilities under the contract unavailable it is wholly due to a cause for which it is responsible and as in the case of the dissolution or receivership of corporations, it should not be exempted from its contractual obligations.

Vide: Williston, Contracts (1920) Section 1960.

Stanton v. *N. Y. & Eastern R.R. Co.*, 59 Conn. 272, 287.

Re Companies' Acts, 117 Law Times 60 (Eng. Ch. D.)

Inchbald v. *Western Coffee Plantation Co.*, 17 C. B. N. S. 733.

(*b*) When this contract was executed it reasonably was within the contemplation of the parties that before 1940 (the period of termination) the petitioner might have wished or even been required to abandon a part of its road. They could have made provisions for a dispensation respecting perform-

ance. Their failure to do so is strongly indicative of their intention.

Vide: United States v. *Gleason*, 175 U. S. 588, 602.
Carnegie Steel Co. v. *United States*, 240 U. S. 156, 164, 165.
Day v. *United States*, 245 U. S. 159.
Columbus Rlwy. & Power Co. v. *Columbus*, 249 U. S. 399, 412.

In *Day* v. *United States*, supra, the Court said:

> "One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by the literal meaning of the words alone. *The Kronprinzessin Cecilie*, 244 U. S. 12, 22. But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent."

It would be absurd to assert that the possibility of abandonment of a portion of its road by the Central New England Railway Company was unforeseeable when the contract was made. If, therefore, such a contingency was not provided for in the contract itself, the petitioner legally is not excused from performing particularly in view of the fact that it voluntarily created a situation which it claims makes the contract impossible to perform.

Vide: Rowe v. *Peabody*, 207 Mass. 226, 232.

(4) It is also plain that the facts in this case clearly exclude any application of the questionable English doctrine that frustration of the commercial adventure brings the contract to an end.

Vide: 40 Harvard Law Review, 305.
American Touring, etc. Co. v. *Baker Whitely Coal Co.*, 117 Maryland, 660.

(j) In the instant case petitioner can derive no assistance whatever from that doctrine because it is clear that its own voluntary conduct was responsible for the changed conditions which it refers to.

The petitioner appears to contend that the fact, if it be a fact, that the Commission figured the $15,000 annual payment as an operating expense is conclusive. We submit that such a finding is of little if any importance in the consideration of this Court, which may determine the character of the charge without reference to the Commission's finding.

Texas & Pacific Ry. Co. v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S., 266, 277.

The motive which actuated the petitioner to discontinue operating a portion of its road is immaterial. It is unimportant whether it applied for permission to abandon upon the ostensible reasons stated in its application or whether the New York, New Haven & Hartford Railroad Company was in fact the *Deus ex machina* in this matter. It is not relieved from its contractual obligations merely because of the informal proceedings before the Interstate Commerce Commission.

Judgment of the state court should be affirmed.

Respectfully submitted,

LOWELL A. MAYBERRY,
Attorney for respondent.

George H. Fernald, Jr.
Of Counsel.

APPENDIX

"A"

(Congressional Record. 66th Congress, 1st Session)
(Vol. 58, pt. 8, p. 8316)

House.—November 11, 1919.

Mr. Esch. We also give the commission the right of treating each emergency as it arises and of also distributing cars and locomotives in order to meet such emergency. With these powers granted and duly exercised we think many of the evils from which the country has suffered in years past may in a large degree be eliminated.

In section 402 we treat of extensions and abandonments. We believe one main cause of the so-called "weak sister" has been the unrestricted right of railroads to be built wherever their projectors thought fit. As a result of this unrestricted right we find in all States of the Union cases where, after a road has been built and long maintained and has gotten its traffic well established, another road puts in a parallel line with the usual result that instead of having one strong road doing the traffic we have two weak roads, as they have to charge the same rate between competitive points, and we burden the public by compelling it to sustain two weak roads when one strong road would have been sufficient.

How does this bill stop that? In this way: Before a road or an extension thereof can be built it must get what is called in this bill a certificate of convenience or necessity from the commission as a condition precedent to the building of a single rod of the extension or of the new line. That means that the commission must first investigate the situation. It must first consult the communities that would be connected or would be located on the proposed line. It must consult the shipping interests and producing interests and all other interests that might be involved and then determine whether or not it should issue a certificate of convenience and necessity.

This is not a new law. Several of the States have this same kind of law now, notably the State of New York and the State of Wisconsin and other states, and the law has worked successfully. It has prevented the construction of new lines that could not by any possibility have any hope of meeting operating expenses, not to say anything about profits. It would prevent the construction of some of these short lines which may have no hope of ultimate financial success. In every way we have felt that this provision would lessen the number of "weak sisters," would prevent the creation of any new ones, and would strengthen the existing lines. We can get better service by strengthening the existing line than by creating a rival or parallel line which would diminish the ability of the first line to make further improvements and betterments. We have also provided for abandonments.

Railroads sometimes desire to surrender the rights granted by their charter. The traffic is not what they expected, business conditions change, the natural resources they thought first to get out of the open market become depleted or become exhausted. There is no power now to restrain abandonment under Federal law. Railroads in many States can do as they will. We provide that there shall be some Federal control over the matter of abandonment, so that cities and villages that have been built up on these lines can be given due consideration by the regulatory body before the order for abandonment is issued. We give such control to the commission to investigate the situation and determine the facts. But neither provision, the building of new lines or the abandonment of old ones, affects spurs or switches or terminal tracks or interurban lines wholly within a State. These we leave to State control, where they already belong.

(Congressional Record. 66th Congress, 1st Session)
(Vol. 58, pts. 1–9. p. 8534.)

House.—November 14, 1919

Mr. Venable. Is it not a fact that there are very few roads that are not engaged in interstate commerce?

Mr. Barkley. Certainly; and they are subject to this act. But if there is to be any authority to put a check on abandonment by railroads subject to this act, regardless of whether or not they are built wholly within the confines of a State, it should rest with the commission. Being engaged in interstate commerce, and thereby subject to the act, that right ought to be conferred on the Interstate Comerce Commission. If the House desires to legislate to the effect that there is never more to be any abandonment of railroads, then the amendment of the gentleman from Missouri should be adopted, because that would be the effect of his amendment.

Mr. MacGregor. Mr. Chairman, will the gentleman yield?

Mr. Barkley. Yes.

Mr. MacGregor. Who is to pay for the operation of railroads if they do not earn enough to keep them going?

Mr. Barkley. I do not know who is going to pay for it. I do not know whether anybody will or not. The object of this provision is to allow the Interstate Commerce Commission to investigate the propriety of abandonment, to investigate whether the abandonment would be in the interest of the public, and to issue a certificate of public convenience and advantage only in cases where it is shown to the commission that the railroads subject to the act or in the interest of the public shall be permitted to abandon some portion of their line, we certainly can trust the Interstate Commerce Commission to take care of the interests of the public. But if we accept the amendment of the gentleman from Missouri (Mr. Dickinson) we accept the idea that no new right of abandonment shall be acquired under the act.

Mr. Bee. Mr. Chairman, will the gentleman yield?

Mr. Barkley. Yes.

Mr. Bee. Does the gentleman from Kentucky think that where a road has secured the right of eminent domain, and right-of-way rights, and has built towns and villages, and homes have been built on the strength of it, they ought to be in a position to abandon, like the Frisco, because it does not pay dividends, a line that it has purchased?

Mr. Barkley. No, because they are being abandoned now, and nobody has the right to say they shall not be abandoned.

Mr. Bee. Have not the State commissions the right to prevent such abandonment?

Mr. Barkley. In some States the commissions have the right; but, taking the country at large, I do not think more than half a dozen States all together have a law concerning abandonment.

Mr. Scott. Mr. Chairman, will the gentleman yield?

Mr. Barkley. Yes.

Mr. Scott. If I understood the phraseology of the gentleman's amendment, I think it will accomplish just the opposite of what he intends to accomplish. It precludes the future abandonment, in any event, and instead of accomplishing the object intended, it will do the reverse.

Mr. Barkley. He seeks to cut off any new right of abandonment in the future. Possibly no rights of abandonment have accrued now, although rights of abandonment accrue only if the Interstate Commerce Commission, after investigation, certifies it will be in the interest of the public. If the gentleman's amendment is adopted it will accomplish the opposite purpose from what he intends.

SUPREME COURT OF THE UNITED STATES.

No. 532.—October Term, 1928.

Central New England Railway Company, Petitioner,
vs.
Boston & Albany Railroad Company, Assignor, for the Benefit of New York Central Railroad Company, Assignee.

On Writ of Certiorari to the Superior Court for the County of Suffolk, State of Massachusetts.

[May 13, 1929.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioner is an interstate rail carrier having a branch line, a portion of which formerly extended a distance of 1.87 miles from Feeding Hills to Agawam Junction, Massachusetts, where it connected with the line of respondent. In order to secure an entrance to Springfield, Massachusetts, petitioner, on October 25, 1899, entered into a contract which provided that until August 30, 1940, it should have the right to operate a limited number of trains per day over the line of respondent from Agawam Junction to Springfield, for which it agreed to pay the sum of $15,000 annually. In 1921, purporting to act under a certificate of public necessity issued by the Interstate Commerce Commission, petitioner abandoned this section of its branch line, notified respondent that it would no longer meet its obligations under the contract and proceeded to sever the connection between their lines.

This suit was brought by the New York Central Railroad, lessee of the present respondent, in the Superior Court for Suffolk County, Massachusetts, to recover from petitioner the annual payments due under the contract and a verdict was returned in favor of the plaintiff. Exceptions to rulings on the trial in the superior court were overruled by the Supreme Judicial Court of Massachusetts on condition that the present respondent be substituted as plaintiff, — Mass. —. The superior court entered judgment for

respondent in accordance with the rescript of the higher court. The judgment of the superior court was thus, under local practice, a final decision of the highest court of the state in which the decision could be had and the writ of certiorari, granted January 2, 1929, — U. S. —, was properly directed to that court. See *Davis* v. *Cohen Co.*, 268 U. S. 638, 639; *Myers* v. *International Trust Co.*, 273 U. S. 380, 381.

Petitioner offered several defenses to the suit in the state court, only two of which involve federal questions, and which alone may be considered here.

1. In June, 1921, petitioner made application to the Interstate Commerce Commission, as required by § 1, paragraph 18, of the Interstate Commerce Act, as amended by the Transportation Act of 1920, 41 Stat. 456, 474, "for a certificate of public convenience and necessity . . . permitting the abandonment of operation of its line between Feeding Hills . . . and Agawam Junction . . ." on the grounds that it could not be operated except at a large annual loss and other available transportation facilities had rendered its continuance unnecessary. The Commission issued its certificate accordingly, authorizing petitioner to abandon the designated section of its branch line.

It is contended by petitioner that the effect of the order was to relieve it from making any further annual payments under its contract. It is said that the provisions of the Transportation Act conferring broad powers on the Interstate Commerce Commission, and designed to secure to interstate carriers an adequate return and the segregation from surplus earnings of a revolving fund for their benefit, see *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478, taken in conjunction with its authority to permit the abandonment by a carrier of a part of its line, evidence a purpose to grant to the Commission power to relieve the carrier from the further performance of obligations already incurred which are incidental to the operation of the abandoned section. From this it is concluded that, as the abandonment of the branch line by which alone petitioner could reach the tracks of respondent, made it impossible for petitioner to exercise its trackage rights over the lines of respondent, the order permitting the abandonment must be taken to have relieved petitioner from its obligation to make further payments which served but to reduce its revenues and so to burden its other commerce.

Respondent argues, with persuasive force, that the purpose of § 1, paragraphs 18, 19, 20 of the Transportation Act, was merely to protect the public from ill advised or improper abandonment of its line by an interstate carrier, *Colorado* v. *United States*, 271 U. S. 153, and that it conferred no authority upon the Commission to relieve a carrier of its contractual obligations either past or prospective, with respect to an abandoned line. But we need not pass on this contention. It suffices, for present purposes, that the certificate and the accompanying report of the Commission did not purport to exercise such a power. The former certified only that present and future public convenience and necessity permitted the abandonment of the designated section of petitioner's branch line and that petitioner was authorized to abandon it. No reference was made in it to the present or any other contractual obligation of petitioner, and respondent, whose rights were vitally affected by the order, if petitioner's contention is to be supported, was not notified of the proceeding before the Commission nor a party to it.

The report mentioned the fact that petitioner's trains entered Springfield over the tracks of the Boston & Albany, for which privilege it paid $15,000 annually, and included a finding that the operating loss for the abandoned section for the year 1920 was $38,832.58. But even though it be possible to spell out of this finding as to revenue the conclusion that the net loss included the annual rental of $15,000, the findings did not so state, nor was the trackage agreement otherwise mentioned. The omission from the certificate of any reference to the contract thus brought to the attention of the Commission, plainly evidences an absence of intention to deal with it. Even if the broad purposes ascribed to the Act be assumed, it is not to be supposed that the Commission intended to do more than was stated in its order or to deprive respondent of income to which it was entitled under its contract for the purpose of lightening the financial burden of petitioner, both of whom were interstate carriers, without giving respondent an opportunity to be heard and without dealing with the question specifically.

To the suggestion of petitioner that, by force of the statute, the permission to abandon its line necessarily operated to cancel its obligation, regardless of the intention of the Commission, we need only say that the statute contains no such provision nor any language suggesting it. We need not decide whether such may be the effect of a proper order of the Commission on contracts pre-

viously entered into by the carrier and not expressly mentioned in the order, where the contract and the order necessarily conflict. *See Colorado* v. *United States*, 271 U. S. 153, 165; *New York* v. *United States*, 257 U. S. 591, 601; cf. *New England Divisions Case*, 261 U. S. 184. But without such a conflict, there could be no justification for holding that the order would also operate *sub silentio* to release a carrier from a contract merely because it had ceased to be of value through compliance with the order. This is especially the case where the other party to the contract is another common carrier with whose financial condition the Commission is equally concerned.

2. Petitioner also challenged the jurisdiction of the state court. As the suit is upon contract and does not assail the order of the Commission, it is not one to "enjoin, set aside, annul or suspend" an order of the Commission of which the federal district courts are given exclusive jurisdiction under § 208 of the Judicial Code. Hence the state court retained its jurisdiction to give "remedies now existing at common law," preserved by § 22 of the Interstate Commerce Act, *Pennsylvania R. R.* v. *Puritan Coal Co.*, 237 U. S. 121; *Pennsylvania R. R.* v. *Sonman Coal Co.*, 242 U. S. 120, and subject to the power of revision by this Court, it could construe the order of the Commission. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285.

In *Lambert Co.* v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377; *Venner* v. *Michigan Central R. R. Co.*, 271 U. S. 127; *North Dakota* v. *Chicago & Northwestern Ry. Co.*, 257 U. S. 485; *Illinois Central R. R. Co.* v. *Public Util. Comm.*, 245 U. S. 493, relied upon by petitioner, affirmative relief was prayed directing either that the order be set aside, or that the carrier do or refrain from doing acts in a manner inconsistent with the order of the Commission directing or permitting certain administrative acts to be performed, relief which, it was held, would operate practically to set aside the order of the Commission. Here respondent does not ask that the order be set aside or that it be regarded as illegal and void; it insists only that the order did not purport to deal with the contract between the carriers, and so cannot have the effect, attributed to it by petitioner, of annuling the contract. The question is merely one of the legal effect of the order. Neither party contests its validity or asks that the carrier be compelled to do anything inconsistent with its terms.

Affirmed.